BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF
TEXAS OFFICE OF PUBLIC UTILITY COUNSEL
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION

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TABLE OF CONTENTS

Page No.

EXHIBITS:

SUMMARY

The Industry Proposals Would End Vigorous Competition On The Internet And Nondiscriminatory Access To Communications Networks

The cable and telephone industries have proposed to administratively repeal much of Title II of the Communications Act, which requires nondiscriminatory access to communications networks. In pursuit of this outcome, the cable TV industry boldly declares an end to the raucously competitive and consumer–friendly Internet, to be replaced by a few facility owners who dictate the pace of innovation and who gets to speak and be heard on the broadband Internet. As the National Cable Television Association put it

> [A] reduction of consumer choice at the ISP layer is not a concern as long as there is adequate competition among companies providing physical transport to the Internet.
>
> [T]he 'plain vanilla' ISPs offering only a straight link to the Internet with no accompanying value added in the form of proprietary content are not likely to survive in the new environment.

By adopting a lax definition of competition and a broad definition of information services bundled with telecommunications services, this approach would open the door to deregulating many of the telecommunications services provided by local telephone companies. Needless to say, the telephone companies fully support the radical deregulation of these services.

The only area in which the cable TV and telephone industries disagree is on whether network access policies should apply equally to both. The cable companies argue that telephone companies must be required to provide open access, while the cable companies must not be. The telephone companies want both networks equally deregulated.

The Record Demands That The Commission Require High Speed Internet Access On Cable Networks To Be Made Available On Nondiscriminatory Terms

Based on the record before the Commission, both the cable TV and the telephone networks should be required to provide nondiscriminatory access and interconnection. The Commission can and should reject this radical transformation of the communications industry for legal, public policy and economic reasons.

The legal arguments put forward by the industry are convoluted at best and certainly at odds with the intent of the Telecommunications Act of 1996.

- The misapplication of a Title I information service classification to the underlying telecommunications service ignores the clear distinction between telecommunications service and information service that the FCC has used for two decades and the 1996 amendments to the Communications Act affirmed.

- The misuse of the Computer II exception for bundles of information and telecommunications services is based on a misreading of the historical context and purpose of the exception.
- The overbroad application of the concept of private carriage ignores the public interest standard for determining when common carriage must be required.
- No stretch of the imagination or over-interpretation of two words added by the 1996 Act can turn broadband Internet access into a cable service.
- Nondiscrimination under sections 201 and 202 of the Act cannot be turned into "one-click" access to the Internet.
- Broadband Internet service does not meet the conditions for forbearance.

The public policy arguments offered by the opponents of nondiscriminatory access are contradicted by the goals of the Communications Act.

- Commenters supporting discriminatory access incorrectly suggest that competition is the only goal of the Act. Ensuring just and reasonable rates, preventing unjust and unreasonable discrimination, protecting consumers and promoting the public interest are equal, if not greater goals.
- These proposals incorrectly reduce the important First Amendment qualities of the Internet to "one-click" access, reducing free speech to merely listening, rather than both speaking and listening.
- These commenters incorrectly equate the elimination of essential/ bottleneck facilities with the creation of effective competition. This duopoly standard falls far short of ensuring effectively competitive markets, and would, as sequence, fail to ensure that the public policy goals of the Act are accomplished.

The economic arguments and data offered by the companies fail to make the case that the current state of competition in these markets can be relied upon to protect consumers, ensure just and reasonable rates and nondiscriminatory access to telecommunications services.

- Cable companies have market power in the cable TV market and have leveraged it into the broadband Internet market.
- Though telephone companies are under an obligation to open their markets, they have dragged their feet and continue to enjoy substantial market power, which they could leverage into the high-speed Internet access market, if their obligation to provide nondiscriminatory access is removed.
- The high-speed Internet market is highly concentrated and likely to remain so.

Voluntary Promises Will Not Produce True Nondiscriminatory Access

Industry behavior in the marketplace contradicts the claims that market power is not or cannot be abused in these markets. Voluntary commitments to open markets have fallen far

short of providing nondiscriminatory access to potential competitors. AOL/Time Warner and AT&T, the new gatekeeper network owners, have insisted upon a wide range of burdensome conditions that will undermine the ability of independent ISPs to compete or innovate.

(1) Prequalification of ISPs to ensure a fit with the gatekeeper business model
(2) Applying ISPs must reveal sensitive commercial information as a precondition to negotiation
(3) Restriction of interconnecting companies to Internet access sales only, precluding a range of other intermediary services and functions provided by ISP to the public (e.g. no ITV functionality)
(4) Restriction of service to specified appliances (retarding competition for video services)
(5) Control of quality by the network owner for potentially competing video services
(6) Right to approve new functionalities for video services
(7) A large nonrefundable deposit that would keep small ISPs off the network
(8) A minimum size requirement that would screen out niche ISPs
(9) Approval by the network owner of the unaffiliated ISP's home page
(10) Preferential location of network owner advertising on all home pages
(11) Claim by the network owner to all information generated by the ISP
(12) Demand for a huge share of both subscription and ancillary revenues
(13) Preferential bundling of services and control of cross marketing of services
(14) Applying ISP must adhere to the network operator's privacy policy

The Failure Of Competition For Core Cable TV And Local Telephone Services

The 1996 Act has failed to produce vigorously competitive markets in the core services delivered by cable TV and telephone companies. While the telephone industry is prevented form leveraging their market power into the broadband Internet, the FCC has failed to prevent the cable TV industry from doing so. As a result cable companies are excluding competition and discriminating against independent service providers.

Cable remains the dominant provider of multichannel video service and high-speed Internet, with a residential market share approaching 80 percent. The industry has become more concentrated in terms of ownership, both through mergers and clustering of systems.

There is an effective noncompete arrangement between incumbent cable companies. They rarely, if every, enter neighboring franchise areas as competitors. Wire-to-wire competition from new entrants is extremely sparse. Since the passage of the 1996, fewer than 3 percent of households have been passed by overbuilders and only 1 percent have switched.

- Price increases continue to run two to three times the rate of inflation as measured by the consumer price index.
- While the industry claims rising costs are driving up cable prices, it neglects to consider increasing advertising revenues. Net revenues per subscriber are up almost 40 percent since 1995. This is three times the rate of increase in the producer price index.
- Prices are higher in clustered systems.

The data also make it clear that satellite does not constrain cable's market power over prices. Cable continues to expand its subscribership, even as satellite expands. Satellite continues to be a niche player, appealing to rural and high capacity customers. Given cable's installed base, losing a few customers to satellite because of abusive price increases is more profitable than competing to prevent satellite from gaining market share. By increasing cable prices cable companies add three or four dollars more than they lose by not competing against cable.

Local telephone competition has gone virtually nowhere and the industry has become more concentrated through mergers.

- Fewer than 3 percent of residential customers nationwide have switched companies and less than one percent of residential competition is based on wire-to-wire competition.
- Incumbent local phone companies have not competed vigorously with one another.

The data indicates that wireless phone service does not compete with local wireline service. Because it is several times more expensive than local service, it cannot restrain incumbent telephone company market power over local phone service. The number of local telephone wires has continued to grow as wireless service has expanded.

Cable companies dominate high speed Internet access markets, which are highly concentrated. Cable operators who enjoy market power in both cable and high-speed Internet have kept their markets closed to competing Internet service providers.

- Virtually no high-speed Internet markets are effectively competitive and many areas of the country will remain monopolies for the foreseeable future.
- Anticompetitive practices pervade the cable network, including the exercise of market power through bundling, boot screen bias, prices squeeze and discrimination in terms of quality.

Policy Recommendations

Open access can advance a number of critical public policy goals such as promoting First Amendment values – fostering citizens' ability to speak and to be heard – and preserving the innovation that is the hallmark of the Internet. Through competition among providers, open access preserves consumer choice in areas such as niche marketing and filtering objectionable content and encourage deployment of competitive facilities to provide high speed Internet access.

The FCC must treat transmission of broadband Internet service over cable facilities as a telecommunications service and quickly commence rulemakings to implement nondiscriminatory interconnection for cable systems.

I. INTRODUCTION

A. CONCLUSIONS AND RECOMMENDATIONS

In initial comments filed in response the Notice of Inquiry (NOI) the Texas Office of Public Utility Counsel (TOPC) concluded that

> The FCC must treat transmission of broadband Internet service over cable facilities as a telecommunications service and quickly commence rulemakings to implement nondiscriminatory interconnection for cable systems and to ensure that the underlying telecommunications services make an equitable and nondiscriminatory contribution to universal service.[1]

Similarly, the Consumer Federation of America (CFA) and Consumers Union (CU) urged a full rulemaking proceeding on open access concluding that open access can promote a number of critical benefits such as:

> Serve First Amendment values – fostering citizens' ability to speak and to be heard…
>
> Preserve the innovation that is the hallmark of the Internet…
>
> Through competition among providers, preserve consumer choice in areas such as niche marketing and filtering objectionable content…
>
> Encourage deployment of competitive facilities to provide high speed Internet access.[2]

In these reply comments, TOPC, CFA and CU (hereafter Consumer Commenters) join together in reviewing the industry comments. We conclude that it is more apparent than ever that the Communications Act requires the Federal Communications Commission (hereafter the FCC or the Commission) to move immediately to ensure open access to

[1] Comments of the Texas Office of Public Utility Counsel, In The Matter of Inquiry Concerning High Speed Access To The Internet Over Cable And Other Facilities, The Federal Communications Commission Gn Docket No. 96-262, December 1, 2000. Unless otherwise noted, all references are to initial comments of the noted commenters.

[2] Consumers Union, Consumer Federation of America, Center for Media Education and Media Access Project (hereafter, Consumers Union).

high-speed Internet telecommunications networks. It is critical that the Commission immediately establish a clear obligation to provide nondiscriminatory access to these telecommunications services, implemented in a light handed manner, that ensures nondiscriminatory access to the communications network of the Internet century. If the Commission fails to do so, the remarkably dynamic competition between thousands of Internet service providers (ISPs) vying for consumers' interest on the Internet will be terminated, replaced by a very small number of huge facilities-based communications giants controlling access to the customer.

It is also clear that the sooner this obligation is imposed, the better. The cable operators describe a series of technical barriers to truly open access, all of which stem from decisions made by these operators about how to deploy and operate the network that were driven by their desire to keep the network closed.[3] The industry has created a problem that it now invokes as a reason to avoid obeying the law. As a result, the public will be forced to suffer under an inferior form of restricted access over cable communications networks for a significant period of time.

The FCC bears part of the responsibility for this troubling state of affairs. Its failure to vigorously enforce legal requirements of nondiscrimination and interconnection encouraged the cable industry to deploy a network that is hostile to open access. Only by establishing a clear public policy requiring nondiscriminatory access implemented through an enforceable right of private action can we begin the process of overcoming the barriers that the cable industry has constructed to an open communications network.

[3] Charter (pp. 9-20) and The National Cable Television Association (pp. 69-89) (NCTA) devote the greatest attention to the technical issues, but virtually all cable industry commenters mention it.

B. ADMINISTRATIVE REPEAL OF TITLE II OF THE COMMUNICATIONS ACT

The comments filed by the cable and telephone industry representatives in response to the NOI present the Commission with a remarkable display of Byzantine arguments and tortured logic attempting to further their own interests at the expense of competition and the public interest.[4] These self-serving pleas and entreaties should be summarily dismissed.

Starting from different origins, the cable and telephone companies end in the same place.[5] By argument and analysis, they would repeal virtually all of Title II of the Communications Act.[6] Upon the alter of deregulation, these industries have sacrificed the ideals of the Act that would ensure choice, competition, and access in the Internet age.

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[4] A few examples of the twists and turns presented by the companies, beyond the ones directly discussed in the text include:

Cable companies refuse to pay franchise fees to local cable authorities on cable modem service claiming it is a telecommunications service, then simultaneously argue that it is not a telecommunications service at the FCC.

Telephone companies sue for interconnection with cable companies under Title II of the Act, then tell the Commission the service is really a Title I service (Verizon, Internet Solutions and Verizon Select Services Inc., v. Cox Communications, Inc., Complaint for Damages and For Declaratory and Injunctive Relief, United States District, Southern District of California, November 13, 2000.

[5] These reply comments focus on AT&T and SBC/Bell South, representatives of the cable TV and telephone industries, since each is by far the largest member of the respective industries, representing almost half of all lines deployed.

[6] Earthlink, p. ix.

> [W]aiving the section 201 requirement that these facilities-based providers offer their transmission services on a nondiscriminatory basis would amount to a wholesale repeal of the concept of common carriage, a concept that is the fundamental underpinning of the Act. Such an action would be to the detriment of consumers and the public interest.

The cable[7] and telephone[8] industries offer the Commission a sequence of alternative arguments for not requiring nondiscriminatory access to high-speed Internet

[7] Comcast, pp. 24-25, argues as follows:

> As explained above, Comcast believes that cable Internet service is properly regarded as a cable service and is in all events an information service that is exempt from any common carrier regulation. But even if the Commission were to conclude that Comcast provides some form of "telecommunications" to @Home, or vice versa, this still would not permit the imposition of ILEC unbundling obligations. Computer II unbundling requirements, or other regulatory conditions applicable to ILECs.
>
> Even if there were any "telecommunications" provided in the course of the Comcast-@Home relationship (or in relationships that may be developed with other ISPs), they constitute, at most, private carriage. Private carriage is not common carriage…
>
> Under these circumstances. even were the Commission to ignore the many aspects of the transactions between Comcast and @Home that extend beyond the mere provision of pure transmission services, any regulation under Title II would necessarily be limited to that appropriate to private carriage arrangements, not common carriage.*
>
> * Comcast perceives no sustainable rationale by which cable Internet services could be subjected to common carriage obligations. If, however, the Commission were to conclude otherwise, it would be imperative for the Commission simultaneously to use its forbearance authority to eliminate any Title II obligations.

[8] SBC/Bell South, pp.

> The most logical framework for such a policy is under Title I of the Act. The Commission has already concluded that Internet access, regardless of the transmission medium, is an “information service" subject to regulation under Title I. And as the Commission recognized three decades ago in the fledgling computer industry, regulation under Title I allows the Commission to leave competitive markets to competitive actors. The Commission has suggested, however, that an information service provider that provides its own transmission facilities might be providing, in addition to an information service under Title I, a "telecommunications service" under Title II. If that is so. the service provider would be subject to regulation as a common carrier. But Commission precedent requires this two-hats/two-Titles approach only where a provider has market power- that is the only circumstance in which the Commission can justify the imposition of a legal obligation to serve indifferently. Otherwise, the decision is left to the service provider, who may - or may not - decide to provide transmission on a common carrier basis.
>
> If the Commission is unwilling to embrace a fully competitive broadband framework, it has available to it an intermediate Title I approach, modeled loosely on the Computer Inquiries' comparably efficient interconnection and open network architecture requirements. Some such requirements - though self-evidently inapplicable where, as here, the telephone network is not a bottleneck - could be resurrected under Title I as a means to facilitate the development of independent ISPs that do not provide their own transmission. If the Commission opts for this intermediate course, however, it must apply it across-the-board. There is no basis for imposing regulation on the nondominant telephone companies that is more intrusive than that felt by the dominant cable

access. In order of preference, they urge the Commission to classify the service as follows.

Both segments of the industry prefer to have high-speed Internet access unregulated under Title I of the Act. Both reject the requirement to unbundle transmission service under the FCC's Computer Inquiry rules (the cable industry by expanding the self-supply exception, the telephone industry by repeal of the rule altogether). Alternatively, if high-speed Internet service is telecommunications, they argue it is private carriage and not a telecommunications service.

If the Commission will not take the radical step of moving a large part of telecommunications from Title II to Title I, the industry urges it to treat high-speed as an unregulated Title II service. They ask the Commission to declare it a telecommunications service that is nondominant, with "one-click" access to the Internet being all that is required for interconnection, and that an obligation of nondiscrimination should not apply.[9]

Failing all else, they ask the FCC to classify it as a telecommunications service subject to forbearance. Forbearance is the least preferred option, because it requires a careful assessment of competition in the industry.

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operators. If the Commission is unwilling to regulate all broadband Internet service providers under Title I only, the only logical alternative is to regulate all of them, cable included,. under Title II.

As under a Title I framework, there is an intermediate approach under Title II as well. The Commission can declare cable operators as nondominant carriers subject to its permissive detariffing policy, thereby subjecting cable Internet services to reduced common carrier regulation.

[9] Cox, p. 19, 29, AT&T, p. 29.

By the cable industry's lax definition of information services bundled with telecommunications services, however, it will be virtually impossible for the Commission to keep anything currently regulated under Title II from sliding into Title I. Not surprisingly, that would be just fine with the telephone companies. The telephone companies have proposed a standard for classifying services as unregulated Title I service that would not only deregulate high-speed Internet access, but could quickly be applied to most of their other telecommunications services offerings.

If the Commission rises to the bait offered by either of these industries, it will be hard pressed to maintain any obligations for nondiscrimination. The communications industry will be turned back a century to a period in which proprietary network owners determined who got to speak and be heard.

The two industry segments disagree on only one detail – whether they must be treated the same in delivering the same service. The cable industry seeks to preserve its advantage as an unregulated high-speed Internet service provider *vis-a-vis* the telephone companies, which are required to provide nondiscriminatory access. Consequently, the cable industry goes through strenuous legal gymnastics to distinguish its high-speed Internet access service from that of the telephone company's. It argues that when cable provides these services they should not be subject to nondiscrimination requirements because they are cable services, or a unique, inseverable bundle of information services and telecommunications, or because cable companies have less market power than telephone companies.

In seeking to preserve its advantage, the cable industry has hired a bevy of big name economists to buttress its arguments that the cable TV and high-speed Internet

access markets are competitive,[10] but the telephone market is not.[11] It has devoted considerable attention to describing the ways in which the telephone companies could leverage their market power in telephone service to gain an advantage in high-speed Internet access service, if they are not required to provide nondiscriminatory access.

The telephone industry responds by devoting at least as much effort to arguing that all suppliers of high-speed access should be treated in the same (preferably unregulated) manner. It has hired two Nobel laureate economists to buttress their argument that it is uneconomic and unreasonable to regulate similarly situated services differently,[12] especially when the regulated service has a much smaller market share and is less ubiquitous than the dominant firms.

C. THE END OF NONDISCRIMINATORY ACCESS TO COMMUNICATIONS NETWORKS

1. The End of a Raucously Competitive Internet

It is widely recognized that the *Computer Inquiries* at the FCC created a dynamic, unregulated information service market.[13] What the industry commenters fail to understand is how the FCC accomplished that goal. It did so by requiring by requiring the underlying communications network to be open and nondiscriminatory.[14] It refused to

[10] These are the usual economists that the industry frequently relies on in proceedings before the FCC (Ordover and Willig for AT&T; Bessen, DeGraba and Woodbury and for NCTA)

[11] AT&T devotes the greatest attention, pp. 87-99, but see also, Comcast, pp. 18-24;

[12] Declaration of Kenneth J. Arrow, Gary S. Becker and Dennis W. Carlton, attached to the filing of SBC/Bell South.

[13] Consumers Union, pp. 11-13.

[14] Cooper, Mark, "Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed Proprietary Networks," *University of Colorado Law Review*, Fall 2000; Lemley, Mark and Lawrence Lessig, Written Ex Parte: In the Matter of Application for Consent to Transfer Control of Licenses of MediaOne Group Inc. to AT&T Corp., Federal Communications Commission, CS Docket No. C99-251, November 10, 1999; Bar, Francois, et. al., *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*, August 1999.

impose regulation on information services, but preserved regulation on the transmission networks over which these services flow. The information service industry grew up precisely because network owners were prevented from being gatekeepers, from dictating how the network could be used and who could provide what services. It was the combination of open access to telecommunications services provided by communications networks and the unregulation of information services that ride on those networks that created the Internet revolution.

The cable and telephone industries now propose to reverse that public policy. Proprietary network owners will pick and choose who gets to bring which products to the public. This violates the fundamental principle of the *Computer Inquiries* and the underlying principles of the Internet.

There can be no doubt that the industry proposals seek to fundamentally change the innovative dynamic of the Internet, putting all the economic power in the hands of the network owners. The National Cable Television Association cites experts who

> felt that "a highly competitive ISP market [is] not very important" and that a reduction of consumer choice at the ISP layer is not a concern as long as there is adequate competition among companies providing physical transport to the Internet."[15]

The cable industry trade association opines that

> the 'plain vanilla' ISPs offering only a straight link to the Internet with no accompanying value added in the form of proprietary content are not likely to survive in the new environment."[16]

[15] NCTA, p. 52, citing General Accounting Office, *Technology and Regulatory Factors Affecting Consumer Choice of Internet Providers,* October 2000.

[16] NCTA, p. 53.

The essence of the Internet, thousands of ISPs competing for consumers, is deemed outmoded by the cable industry since

> an environment preserving thousands of small ISPs may be unnecessary to ensure responsive customer service, technological advancements, and innovative content.[17]

In this closed proprietary world, the cable companies decide what is important to the consumer. As Cox argued,

> **The openness that really matters to consumers – and what makes the Internet special and remarkable – is the ability to go anywhere, to access any information with a single click of a mouse**.[18]

In this old economy model of facilities-based competition, the decision of which content gets to the public is left to the "cable operator-ISP relationships that are developing in the marketplace" since

> cable operators would have every incentive to offer their cable modem subscribers those unaffiliated ISPs offering unique content and value, since customers would follow the ISP they prefer to another high-speed distributor that offered that ISP.[19]

The effort of the cable industry to convince the Commission that vigorous ISP competition is not necessary rests on an interestingly selective citation from a recent General Accounting Office report. Since the policy of closed access it has imposed and is defending will inevitably destroy the current vigorous competition on the Internet, the NCTA chose to ignore a strong view reported by the GAO that this ISP competition is critically important to the development of the Internet.

> The experts and industry officials we interviewed differed over whether a reduction in ISP choice-if it occurs-constitutes a public policy concern.

[17] NCTA, p. 53.

[18] Comcast, p. 31, emphasis in the original.

[19] NCTA, p. 53.

> Some experts felt that a highly competitive ISP market was not very important. In particular, several of these experts noted that the ISP market itself was an artifact of telephone regulations-that is, no specific policy was undertaken to promote the ISP market per se, but the market developed because of the particular manner in which the telephone network was structured and regulated. Many of these experts stated that a reduction of consumer choice at the ISP layer is not a concern as long as there is adequate competition among companies providing physical transport to the Internet. Others, however, expressed concern about potential concentration in the ISP market and suggested that consumers will be better served by having choices among both Internet transport providers and multiple ISPs. Several experts we spoke with also stated that ISP choice is important, in part, because of the changing nature of that industry. In particular, these experts noted that many ISPs are making a transition from providing only a simple "on-ramp" to the Internet to providing content and applications. A potential ramification of this transition is greater control by ISPs over what content is prominently displayed to consumers. Therefore, greater consumer choice among these "content aggregators" is seen by some as important because it can enhance consumers' access to varied content. Thus, these experts contend, if consumers dislike the content choices of particular ISPs, it is important that they have the option of "voting with their feet" by switching to any of several other ISPs that may provide alternative content choices.[20]

If anything, the GAO gave much more prominence to the competing view. The GAO gives a good summary of how the policy of open access helped to create the vigorous competition on the Internet. There is no doubt that if the Commission allows high-speed access to continue on its closed, facilities-based path, the extent of competition on the Internet will be dramatically reduced.

2. The Broader Threat to Nondiscriminatory Communications Networks

The danger in this proceeding does not stop with the loss of nondiscriminatory access to the next generation of the Internet. There is a broader and more pervasive threat to fundamental principles of nondiscrimination and interconnection. This can be seen quite clearly in the formulation of the issue in joint comments by SBC and Bell South. In

[20] GAO, p. 30.

their formulation, even dominant firms with 75 percent market share and a more ubiquitous technology are presumed not to possess sufficient market power to trigger the nondiscrimination and interconnection requirements of Title II.

> Thus, properly joined, the issue here is whether cable has sufficient broadband market power for the Commission to require it to operate as a common carrier. It is a close call, as cable operators serve close to 75 percent of the market, and their upgraded networks are far more ubiquitous than any competing networks. But the better answer – the one that fully accounts for the potential of competitive alternatives – is that cable is not a bottleneck in the market for broadband access. Cable operators should therefore be given the *option* – as in fact other service providers have been given the option, in many different service contexts – whether to provide a separate broadband transmission path subject to Title II, or whether instead to package their services exclusively under Title I.[21]

Of course, the local phone companies insist that once the Commission reaches this conclusion, it must treat them in the same fashion and dismantle the rules that have provided nondiscriminatory access to their high-speed networks.

> If cable operators – the dominant providers of high-speed Internet access – are to be given this option, however, it necessarily follows that incumbent telephone companies – the nondominant latecomers to this market – must be given the same option…
>
> Once it is clear that incumbent LECs cannot be compelled to provide broadband on a common carrier basis, it follows that the enormous regulatory scaffold that the Commission has build up around incumbent LEC xDSL offerings must be dismantled. Unbundled access to the high frequency portion of the loop, loop conditioning, loop qualification, related collocation mandates, the restriction on providing in-region interLATA information services, mandatory resale discounts, separate affiliate conditions – all of these requirements (and more) are premised on the counter-factual premise that ILECs control a broadband bottleneck. None can stand once ILECs are no longer required to offer broadband transmission on a common carrier basis.[22]

[21] SBC/Bell South, p. ii.

[22] SBC/Bell South, p. iii.

In the view of the telephone companies, the finding that the market structure of broadband Internet access opens the door to Title I "election" by communications carriers, eliminates the justification for the Computer Rules, although these companies would accept them, as long as they are treated at parity with the cable companies.

> If the Commission is unwilling to embrace a fully competitive broadband framework, it has available to it an intermediate Title I approach, modeled loosely on the Computer Inquiries' comparably efficient interconnection and open network architecture requirements. Some such requirements - though self-evidently inapplicable where, as here, the telephone network is not a bottleneck - could be resurrected under Title I as a means to facilitate the development of independent ISPs that do not provide their own transmission.[23]

Note that the Bells present a view of a facilities-based Internet competition that agrees with the cable industry view. If non-discriminatory access is not provided, independent, non-facilities based ISPs will be at great risk.

The special danger in this proposal comes when one considers the implications of this market structure for the low frequency portion of the loop. Bell South declared two years ago that wireless is a competitor of wire line for local service. Should the Commission fall prey to the telephone industry arguments in the broadband market/high frequency part of the loop, then the FCC will be hard pressed to justify the alleged "discrepancy" or "non-parity" of regulation between broadband and voice service.

D. LEGAL, POLICY AND ECONOMIC REASONS TO REJECT RADICAL DEREGULATION OF TELECOMMUNICATIONS SERVICES

The Commission must reject this radical transformation of the communications industry for legal, public policy and economic reasons. Fortunately, the record before the

[23] SBC/Bell South, p. iv.

Commission provides no compelling reason to abandon the principles of nondiscrimination and interconnection that have guided the industry for a century and were reaffirmed in the Telecommunications Act of 1996.

The legal arguments put forward by the industry are convoluted at best and certainly at odds with the intent of the 1996 Act.

- The misapplication of Title I information service classification to the underlying telecommunications service simply ignores the clear distinction between telecommunications service and information service that the FCC has used for two decades and the 1996 amendments to the Communications Act affirmed.

- The misuse of the Computer II exception for bundles of information and telecommunications services is based on a misreading of the historical context and purpose of the exception.

- The overbroad application of the concept of private carriage ignores the public interest standard of determining when common carriage must be required.

- No stretch of the imagination or over-interpretation of two words added by the 1996 Act can turn broadband Internet access into a cable service.

- Nondiscrimination under sections 201 and 202 of the Act cannot be turned into "one-click" access to the Internet.

- Broadband Internet service does not meet the conditions for forbearance.

The public policy arguments offered by the opponents of nondiscriminatory access are contradicted by the goals of the Communications Act.

- Commenter incorrectly suggest that competition is the only goal of the Communications Act. Ensuring just and reasonable rates, preventing unjust and unreasonable discrimination, protecting consumers and promoting the public interest are equal, if not greater goals.

- They incorrectly reduce the important First Amendment qualities of the Internet to "one-click" access, reducing free speech to merely listening, rather than both speaking and listening.

- Commenter incorrectly equate the elimination of essential/ bottleneck facilities with the creation of effective competition. This duopoly standard falls far short

of ensuring effectively competitive markets, and would, as sequence, fail to ensure that the public policy goals of the Act are accomplished.

The economic arguments and data offered by the companies fall far short of making the case for this radical deregulation, as evidenced by the effort to avoid a full forbearance proceeding. Industry behavior in the marketplace contradicts the claims that market power is not or cannot be abused in these markets. By structural standards and measures of conduct it is clear that

- Cable companies have market power in the cable TV market. Cable companies not only have the ability to leverage that market power into the broadband Internet market, but they have been exercising it.

- Telephone companies possess similar market power in their core service market. Even though they are under an obligation to open their markets, they have dragged their feet and continue to enjoy substantial market power, which they can leverage into the high-speed Internet access market, if they are not prevented from doing so by providing nondiscriminatory access.

- The high-speed Internet market is highly concentrated and not likely to change any time soon.

The remaining sections of these comments outline the legal, policy and economic reasons.

II. LEGAL GYMNASTICS TO ESCAPE TITLE II NONDISCRIMINATION OBLIGATIONS

A. THE COMMON SENSE VIEW OF COMMUNICATIONS NETWORKS AND SERVICES ADOPTED IN THE 1996 ACT

In the effort to defend its competitive advantage over the telephone companies, the cable industry twists the plain language of the Act beyond recognition. Our initial comments demonstrated that the 1996 Act created a logically coherent and sensible view of the interrelationship between telecommunications, telecommunications services and information services. Other commenters, who share this view, have demonstrated that this view is well grounded in court rulings and prior commission decisions.[24] In these reply comments, we restate the logical set of definitions adopted by the Congress and review the legislative history, which clearly supports our view.

It is logical to assume that information services would require some form of transmission.[25] Congress recognized that information services would ride on

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[24] In particular, see the comments by Earthlink and the Competitive Access Coalition. Consumer commenter do not attempt to reiterate and respond to the wide array of legal arguments put forth in the comments. Consumer commenters specifically endorse the legal analysis of Earthlink. Commenters note that while the Bell Operating Companies have altered their strategic positioning, their basic legal analysis remains the same: the Commission may impose legal open access requirements and all providers of high speed Internet access should face similar regulatory burdens.

The intensity and complexity of the comments submitted to the Commission on both sides of the issue evidence one thing clearly: if the Commission so desires, it may impose open access requirements on cable operators offering Internet access. The law is no bar to that outcome. The question remains, will the Commission hold to the underlying policies that have produced a wildly successful Internet thus far? This policy has not only produced commercial success, but also the most First Amendment friendly electronic medium this society has yet to produce.

[25] Earthlink, p. 34

> As the foregoing examples indicate, the Commission has for over twenty maintained a distinction between "enhanced services" (now "information services" in the terminology of the amended Act) and "basic" transport services ("telecommunications services" under the amended Act). Without exception, what are now known as information services have always been recognized as being provided over common carrier services regulated under Title II of the Act. As noted above, the 1996 amendments to the Act explicitly adopt the distinction between

telecommunications networks. Information services are defined by user controlled two-way activities over telecommunications networks.

> Information service – The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management control, or operation of a telecommunications system of the management of a telecommunications service.[26]

Information services are clearly distinguishable from telecommunications in the sense that telecommunications is the simple movement of the information the user generates and directs.

> Telecommunications – The term telecommunications" means the transmission between or among points specified by the end user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Congress recognized that telecommunications networks would be used for many purposes, and it specified how each use would be treated under the Act. One of the uses of the information capability or the network was the management of the flow of information services.[27] The use of the network owner of information capability to manage the network was not to be considered an information service. The fact that

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> the two types of service by specifying in the definition of "information service" that such service is provided "via telecommunications." Moreover, the definitions of "information service" and "telecommunications" describe two very different functionalities. On the one hand, "information services" provide the capability of "storing, transforming, processing," and otherwise manipulating information. On the other hand, "telecommunications" by definition involves the transmission of information without such manipulation.

[26] Section 3, Definitions.

[27] Cable companies erroneously equate Internet architecture with a "dumb pipe" view of the network (Cox, p. 17). The issue is not whether the network is smart or dumb, in fact the open access regime has relied upon a great deal of intelligent management functions in the network. Nondiscrimination requires the network, whatever its level of intelligence, to be neutral in its operation and to not interfere with intelligence at the ends.

network operators would use these capabilities to manage the flow of information services does not change the definition of those services.

When telecommunications are offered to the public for a fee, they become telecommunications services.

> Telecommunications service – The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

When a telecommunications carrier offers telecommunications services, Congress wanted those services regulated as common carrier services.

> Telecommunications Carrier – The term 'telecommunications carrier' means <u>any</u> provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier <u>shall</u> be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage (emphasis added).

B. INFORMATION SERVICES ARE NOT CABLE SERVICES

As noted above, the cable industry denigrates the creative and interactive role of the customer in the use of the Internet, reducing it to "one-click" access to the Internet. This is part of the effort to shoehorn information services provided over cable transmission facilities into the cable service category.

In contrast, to the fundamentally interactive nature of information services which are defined by the ability of users to create information and direct it to selected locations,

cable services are a one-way proposition in which the user plays little active role, other than selecting the service.[28]

> The term "cable service" means –
>
> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
> (B) subscriber interaction, if any which is required for the selection or use of such video programming or other programming service;

The only change in the definition of cable service in 1996 was the addition of the words "or use," to part B of the definition. The cable industry has tried mightily to interpret that addition of the words "or use" to the second part of the definition of a cable service to mean that Congress dramatically expanded the definition of a cable service to include two-way information services. This would transfer the regulation of information service over cable to Title VI.

In other words, the cable industry's argument is that adding the words or use to part B of the definition of cable service was Congress's shorthand way of describing the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available an information service." A much more likely interpretation is that if Congress wanted to make such a dramatic transformation in the definition of cable service in Part A, it would have done so. By changing Part B, which deals with the management of flows over the network, Congress recognized that more sophisticated selection choices of services would be necessary as choices of services became more complex. Above all, it would suggest that Congress wanted to accommodate interactivity that might surround one-way video services.

[28] Efforts by the cable company commenter to use the addition of the words "or use" to the definition of cable service to turn information services into cable services are (Earthlink, pp. 10-15)

The Conference report also did not take the opportunity to indicate Congress intended to have information service disappear into cable service.[29] In fact, looking at the House explanation of the definitional change that was adopted, it explicitly intended to capture the interactivity surrounding video programming services, not sweep the entirety of information services up into the definition of cable services.

> Section 307(a) of the House amendment amends the definition of "cable service" in section 602 (6) of the Communications Act by adding "or use" to the definition, reflecting the evolution of video programming toward interactive services.

The fact that information services use the transmission capabilities of cable systems, does not turn them into cable services. Nor does the fact that the cable network provides transmission services, prevent them from being defined as telecommunications services. The Act clearly intended for all technologies to be treated similarly and wanted

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[29] Earthlink, p. 47, points out that the overall structure of the 1996 amendments further supports this interpretation.

> The Internet access provided by cable operators through Excite@Home and Road Runner is no different from the Internet access provided by any other local exchange carrier (incumbent or competitive) through its own affiliated ISP . The Commission itself describes cable modem service, and in particular the service provided to AT&T's customers through @Home, in terms of separate services that are bundled together when offered to the consumer. One of the services is "the underlying transport service" or "use of the cable network for data delivery services," while the others are described as "Internet access" and "content. " When discussing Internet access provided by incumbent local exchange carriers using broadband transmission technology the Commission stated recently that: An end-user may utilize a telecommunications service together with an information service,' as in the case of Internet access. In such a case, however, we treat the two services separately: The first service is a telecommunications service (e.g., the xDSL-enabled transmission path), ~ The structure of the Act as amended by the 1996 Act fully supports this result. All of the amendments to the Act that were made by the 1996 Act which include the term "information service" were placed in Title 11. See 47 U.S.C. §§ 228,230,251,254, 256, 258,259,271, 272, and 274. None of the amendments made by Congress to Title VI in the 1996 Act used the term "information services." Instead, the major thrust of the changes Congress made to Title VI of the Communications Act in the 1996 Act were devoted to maintaining the demarcation line between "cable services" and non-cable (i.e. telecommunications and information) services. See 47 U.S.C. § 571- 573. In Title V of the 1996 Act, Congress made numerous changes to existing law to address concerns about obscenity and violence on the Internet and on television. All of the provisions addressing the Internet or computer services were included in Title II of the Communications Act, while no

telecommunications services regulated as common carrier services, "regardless of the facilities used."

C. TELECOMMUNICATIONS SERVICES PROVIDED BY CABLE OPERATORS ARE SUBJECT TO THE ACT'S NONDISCRIMINATION REQUIREMENTS

In the definition and discussion of information services, telecommunications services and cable services, the Act plainly distinguishes between information services and telecommunications services. The Act clearly establishes the relationship between information service and telecommunications. Information services ride on telecommunications. Nevertheless, the cable industry claims that the provision of information services via cable facilities that provide the necessary telecommunications transmission to deliver them creates some sort of integrated, non-severable bundle.

Technologically this is not the case, as the cable operators now admit. They can sell transmission of information separately from the generation of information, they have just chosen not to, heretofore. It is clear in the Act that Congress understood the two functions were distinct.

The cable industry argument is rooted in an effort to convince the FCC that its policy of exempting some bundles of information and telecommunications from the nondiscrimination requirement should be extended to the entire cable industry. This is based on a misinterpretation of historical precedent. [30]

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mention of either computers or the Internet was included in the provisions dealing with video programming and cable services.

[30] EarthLink, p. 28 29.

They may argue that the transport (telecommunications) service over which the Internet access information service rides is never offered by itself, but is offered only as a means of providing the information service. The argument continues that the single service being offered is an "information service" that is not regulated under Title II of the Act. If made, this is simply the

Because the telecommunications network was open and nondiscriminatory, the Computer Inquiries made an exception for certain, small bundles of information services and telecommunications. If an information service provider added an ounce of telecommunications to a pound of information, the service remained an information service because these providers could not substantially affect the ability of the competing Internet service providers to reach the public.

The industry commenters turn this exception on its head. For them, adding an ounce of information to a pound of telecommunications turns the bundle into an information service, even though control of this bundle dictates the ability of competing ISPs to reach the public. If a cable provider combines information and telecommunications, the bundle is integrated and inseverable; if another service provider does the same, it can be severed.[31]

The cable industry seeks to avoid the obligation to provide nondiscriminatory carriage by insisting that even if it makes telecommunications service available to information service providers who make it available to the public, this is just private carriage.[32] The strategy here is to deal with a few members of a class of customers and

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"bundling" or "contamination theory" argument that the Commission has consistently rejected with respect to facilities- based carriers, much the same as the Commission refused to allow the fact that a carrier or an ISP chose to offer a telecommunications service and an information service for a single price to the consumer to "taint" the telecommunications component and render the entire package an information service.

[31] NCTA, pp. 11-12, 27,

[32] Earthlink, p. 29.

In the event that cable operators argue that they are not providing cable modem services directly to the public, but are instead offering that transport only to selected ISPs, the Act's language regarding offering of service "to such classes of users as to be effectively available directly to the public" is sufficient to answer such an argument. It is clear that when Excite(@Home or RoadRunner offer Internet access service they are making their service available. Thus, the underlying telecommunications used to transport that Internet access

refuse to deal with others. In other words, by engaging in discrimination, the cable industry claims it can avoid the obligation not to discriminate simply because they have not acted as though they should behave in a nondiscriminatory manner. The industry points to the fact that it demands individual contracts and plays hard to get in protracted negotiations as proof that nondiscriminatory, standard offers cannot be made.

This is obviously a wonderful strategy for any common carrier who does not want to be one to escape its obligation to provide nondiscriminatory access by simply refusing to provide it. This is a loophole that the Congress did not allow.

> If the Commission were to accept the argument that an information service provided through an affiliate of the transport facility owner can be made available to the public without having the transmission service used to carry that information service to the public being considered a telecommunications service, it would provide a blanket waiver for all facilities-based telecommunications carriers to escape Title II regulation under the Act. Essentially, if it were to accept such an argument, the Commission would be sanctioning a shell game in which the transmission facility owner, by refusing to provide transmission services to any information service provider other than its own affiliate, would be able to provide information services indiscriminately to the public for a fee without becoming a common carrier subject to Title II of the Act. As discussed further below, the Commission and the courts have refused to accept such an argument in the past…
>
> The language of the 1996 Act, the Commission's recent interpretations of the language, and over twenty years of Commission precedent all indicate that the Commissions Act, as amended, recognizes that information services like Internet access are <u>always</u> provided subject to Title II of the Act.[33]

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service is also --as a matter of logic, network engineering necessity, and statutory definition -- being made available to the public.

[33] Earthlink, pp. 28, 29… 34.

In the 1996 Act The Congress anticipated new types of facilities being used to provide telecommunications services and they wanted them regulated as common carriers to the extent that they provided such services.[34]

D. THE NINTH CIRCUIT RULING CORRECTLY DEFINED THE LEGAL STATUS OF THE TRANSMISSION OF HIGH-SPEED INTERNET SERVICE OVER CABLE FACILITIES

The court decision in the case of AT&T v. Portland, which is cited as the trigger for the instant proceeding, got it exactly right. So crystal clear and correct was that court in its reasoning, that it bears repeating.

> Under the statue, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscriber access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or the content of the information as sent and received." A provider of telecommunications services is a "telecommunications

[34] The Conference report language is consistent with this inclusive interpretation of a telecommunications service. The House Report language made such a distinction between common and private carriage that might have supported the cable industry view, but The Senate legislative language included the key phrase "or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" and the Senate Report language was clearly inclusive

> The term "telecommunications service" defined in new subsection (mm) of section 3 of the communications Act means the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available to the public, regardless of the facilities used to transmit the telecommunications service. This definition is intended to include commercial mobile service ("CMS"), competitive access service, and alternative local telecommunications services to the extent they are offered to the public or to such classes of users as to be effectively available to the public.

AT&T's references to FCC orders that rely on House language (AT&T, p. 24) cite the wrong legislative history. The NCTA also relies on Virgin Islands without recognizing the flawed analysis contained therein. NCTA Comments at 14, note 36. NCTA is incorrect when it argues that a finding of "market power" or the lack of alternate facilities are the only reason a service could be regulated as common carriage under the second prong of the NARUC I test. NCTA Comments at 15-16. The Commission is by no means limited to those justifications for such a finding. Regardless, as the analysis in these Reply Comments show, in many instances cable companies do exercise market power and in many areas of the country no alternate high speed facilities are available.

> carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used…"
>
> ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers…
> Like other ISPs, @Home consists of two elements: a pipeline (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

As the 9th Circuit Appeal Court pointed out, the statute mandates specific conditions in the provision of telecommunications services.

> Among its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection. See 47 U.S.C. s. 201 (a) …s. 251 (A) (1)… Together, these provisions mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers. As applied to the Internet, Portland calls it "open access," while AT&T dysphemizes it as "forced access." Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." The Internet's protocols themselves manifest a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

III. PUBLIC POLICY: THE INDUSTRY'S FLAWED MODEL OF COMMUNICATIONS MARKETS

A. PROMOTING COMPETITION IS NOT THE ONLY GOAL OF THE COMMUNICATIONS ACT

As the Portland court recognized, under Title II, the Commission has the authority to forbear from regulating telecommunications services. This is the least preferred alternative of the industry commenters for good reason. We believe it will be impossible for the industry to meet the stringent conditions laid down by the Congress. In fact, a good case can be made that with respect to the obligations of nondiscrimination and interconnection, forbearance is not in the public interest.

The subjugation of all policy to the model of facilities-based competition violates the Communications Act by completely subjugating all policy decisions to the effort to promote competition between facility owners. The elimination of nondiscriminatory access and the tying of Internet service to facility ownership would destroy the remarkable advancement in freedom of speech that the Internet has fostered.

Competition is not the only purpose of the Communications Act. Even though the 1996 amendments added a goal of promoting competition, the Telecommunications Act of 1996 did not repeal the other goals of the Communications Act.[35] It strongly reaffirmed the commitment to those other goals.

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[35] The Conference report opens with the following

> The committee of conference on the disagreeing votes of the . um RAC two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, deregulatory national policy Framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes (emphasis added).

Sections 201 and 202 of the Act, which are the cornerstone of Title II, were not amended. The standards of just and reasonable rates, nondiscriminatory interconnection, consumer protection and promotion of the public interest were preserved. In the details of the amendments these other goals were given equal prominence with the goal of competition.

For example, the most explicit change in the Act that would allow deregulation under certain circumstances (the forbearance language), reaffirmed the commitment to these other goals.

> SEC. 10. (a) Regulatory Flexibility: Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision or regulation is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.
>
> (b) Competitive Effect to be Weighed – In making the determination under subsection (a) (3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

In this formulation, note that promoting competition can be cited only as influencing the public interest finding. It does not directly override the standards of just and reasonable rates, the prohibition against unjust or unreasonable discrimination, or consumer protection. Further, note that even with respect to the public interest, the competition finding is permissive, not mandatory.

Commenters who seek to equate competition with the promotion of the public interest are wrong as a matter of law and wrong as a matter of public policy. The Center for Democracy and Technology made this point forcefully in its comments.

> The FCC ensures the representation and involvement of the public interest in determining and implementing the details of open access. Absent FCC action to involve the public, decisions about access to broadband Internet technology will be made in closed-door, private commercial negotiations that will not reflect the public interest. The Internet industry has frequently sought to exclude government and to solve problems without governmental mandate. In most situations, this voluntary approach is desirable (and indeed, is actively promoted by CDT), but for it to succeed when free speech and the First Amendment are at stake, the public interest must be reflected in the network and infrastructure design decisions. Values of free speech will not in every instance coincide with the goals and values pursued by private parties. Simply put, free speech is too important to leave solely in the hands of private industry.
>
> CDT believes that a process involving policymakers, the public interest community, and the Internet industry must be created to monitor the development of open access, and to ensure that the public has an effective voice in that implementation…
>
> Such a process *cannot* be limited to the open marketplace – it is not enough that members of the public can express preferences with their feet and their pocketbooks. When free speech is at issue, it is very often precisely those that lack money, numbers, or market power in general that most need protection. Often, the mass of citizenry would be perfectly happy to limit a particular type of expression protected by the First Amendment, but that expression is nevertheless protected. It is precisely this type of freedom and openness – in which small, underfunded, and sometimes disfavored speakers can nevertheless speak – that makes the Internet the unique and dynamic communications medium it is today.

> Moreover, it is precisely this type of freedom and openness that is at risk as the Internet moves to a broadband world.[36]

The cable industry's claim that the Internet can be reduced to "one-click access," which is all that consumers want, dramatically devalues the Internet. As pointed out by the Center for Democracy and Technology, what is really unique about the Internet is not the ability to "hear" (access) information, but to the ability to speak.[37] That is exactly what the closed proprietary model destroys, by preventing unaffiliated ISPs from reaching consumers and preventing consumers from using the network in the unfettered manner that the Internet has allowed.

B. ELIMINATION OF ESSENTIAL/BOTTLENECK FACILITIES IS ONLY A SMALL STEP TOWARD EFFECTIVE COMPETITION

The assault on common carriage relies on the claim that the existence of a bottleneck is the sole concern. Throughout the industry comments, in making the argument for Title I treatment, or nonregulation under Title II, the standard repeatedly invoked to end public interest and common carrier obligations is the existence of an alternative means of communications. As long as there is an actual, or potential alternative service provider, no matter how meager its market share or inadequate its

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[36] Center for Democracy and Technology, pp. 18-19.

[37] Opponents of open access attempt to equate regulation with limits on free speech. Consumer commenters argue that Judge Middlebrooks' opinion in Comcast Cablevision v. Broward County, No. 99-6934-Middlebrooks (S.D. Fla. Nov. 8, 2000) demonstrates that open access requirements will interfere with cable operators' First Amendment rights. See, e.g., NCTA Comments at 38-39. As Commenters explained in their initial comments, CU et al. Comments at 6-9, the Broward County decision is deeply flawed. Even attorneys for AT&T have acknowledged the weakness of the First Amendment challenge to open access requirements and have questioned the level of scrutiny applied by Judge Middlebrooks. See "US District Court Overturns Fla. Open Access Statute" Communications Daily at 1 (Nov. 14, 2000).] But it is clear that the narrowband Internet as we know now, which all acclaim as a free and diverse medium, was produced with much more rigorous open access requirements than now proposed for cable operators. If the Commission refuses to act now under the misguided belief that it is avoiding heavy-

ability to provide service, these arguments declare the absence of a bottleneck, essential facility. If there is no bottleneck or essential facility, they claim that there is no basis for regulation, and no obligation of nondiscrimination and interconnection.

These arguments ignore the difference between the FCC's role and the roles of the Federal Trade Commission (FTC) and the Department of Justice (DOJ). White the FTC and DOJ focus on purely antitrust and consumer protection, the FCC has a more sweeping standard to uphold: the Communications Act's public interest standard. The separate and unique role of the FCC is evident and necessary in precisely the context of open access. The FCC would be derelict in its statutory duty if it limited itself to an antitrust analysis.

Even within the purely economic realm, the essential facility argument is the wrong standard, effective competition must be the standard. The essential facilities doctrine is a relevant antitrust concept, but it is not the only antitrust concept and it does not govern Communications Act policy.

For example, merger policy is not governed by the essential facilities doctrine. A merger that would result in an essential facility/bottleneck situation would certainly be challenged, but many mergers that fall far short of creating that dire situation are also challenged. The essential facilities doctrine falls far short of Communications Act standards.[38]

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handed regulation, it will most assuredly find itself -- to its chagrin -- performing the equivalent of an AT&T breakup in the future.

[38] Recently, as the Commission is well aware, the Department of Justice objected to the merger of the number two and number three long distance companies (MCI and Sprint), even though no bottleneck facility would result. Indeed, the post-merger firm would have remained far smaller than the largest firm in the industry. The loss of competition and the potential for abuse of market power was deemed too great under the antitrust laws.

- The absence of an essential facility tells us nothing about the state of competition in the market. The absence of a monopoly is not synonymous with the presence of a workably competitive market.
- The absence of exclusive deals does not mean there is no discrimination.
- Only effective competition could be offered as a bulwark against unjust rates or discrimination.

Thus, the analysis of competition in communications markets must be based on a standard of actual, effective competition. This is the minimum standard that must be imposed if the purpose is to ensure that the charges, practices, and classifications are just and reasonable, are not unjustly or unreasonably discriminatory, and that consumers are protected (as noted, promoting the public interest requires even more).

In our view, merely eliminating the bottleneck comes nowhere near achieving the level of competition necessary for markets to ensure those goals. The duopoly that results from the mere elimination of a bottleneck remains a highly concentrated market, in which the abuse of market power is likely. This is especially true when the entities that dominate the highly concentrated market that is about to be deregulated have market power in neighboring markets and are using it to leverage the new market.

C. COMPETITION DOMINATED BY FACILITY OWNERS WILL NOT PRODUCE NONDISCRIMINATORY ACCESS

The industry fails to demonstrate that the facilities-based market it proposes will function to meet even the economic goal of competition. First, in the facilities-based world that the cable industry advocates, there would be at most a handful of choices, not the hundreds or thousands we have today.[39] Each facility owner will choose a small set of

[39] Although the Department of Justice and the Federal Trade Commission have found and acted upon the finding that the broadband market is a distinct market from narrowband (i.e. narrowband is not an effective substitute for broadband), the cable industry commenters continue to rest a large part of their

Internet service providers to promote. This outcome is unacceptable because the field of competition would be so narrowed that the ability to exploit market power would be dramatically enhanced. Innovation would be controlled by facility owners, exactly the problem that the Computer II rules prevented.

Further, one of the critical elements of forbearance and one of the primary reasons that the industry wants to avoid such a proceeding is the fact that forbearance is specific to carriers or service and be based on findings about "any or some of its or their geographic markets." Congress recognized that market power is a localized phenomenon in the provision of telecommunications services. In those markets where competing facilities are not deployed or are inadequate, dominant facility owners will possess unfettered market power. It is widely recognized that facility coverage of various markets will be uneven and the technological capacity of different facilities varies widely. As a result, product and geographic market power will be easily exercised. The cable industry model leaves large section of the market unprotected by even the meager level of competition it claims.

Above all, the record before the Commission in this proceeding, and the cable TV's history of abuse of the public with its closed proprietary model, shows that the behavior of the industry contradicts the promises and claims about how the facilities-based market will work.[40] The measure of "unique content and value" will be set by the network

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case on the purported competition between narrowband and broadband (see AT&T, pp. 5, 48; NCTA, p. 40; Cox, p. 14; Charter, p. 3, 6).

[40] Earthlink, p. ix.

Given that cable companies have conclusively demonstrated that they will make their transmission services available to ISPs only when forced to do so, there is no basis for the Commission to forbear under the theory that the "market" will lead to meaningful open access. EarthLink makes this statement advisedly, having recently negotiated an open access agreement with Time Warner Cable. Despite our sincere belief that that agreement will provide important benefits and increased service offerings to our customers, EarthLink is under no illusion that this single agreement, which was the result solely of

owner's proprietary interest, not the public interest in competition and the free flow of information. As described below, the industry's idea of unique content and value are reduced to a proprietary icon and bundled browser that steers customers and closes out competitors.

Notwithstanding eleventh hour promises to negotiate access with unaffiliated ISPs at some point in the future, not one cable operator has voluntarily allowed commercial access to any unaffiliated ISP. Only in response to public outcries during legitimate regulatory proceedings, such as merger reviews and franchised transfers, or the court reversal that led directly to this proceeding, have cable operators agreed to allow some unaffiliated ISPs to obtain access to some cable modem platforms at some point in the future. Unfortunately, the terms and conditions stipulated in voluntary negotiations however remain discriminatory and anticompetitive.

A Term Sheet offered by Time Warner to unaffiliated ISPs who had requested access to its network during the summer of 2000 gives a new and troubling specificity to the threat to innovation. There in black and white are all the levers of market power and network control that stand to stifle innovation on the Internet. Time Warner demanded the following:

(1) Prequalification of ISPs to ensure a fit with the gatekeeper business model

(2) Applying ISPs must reveal sensitive commercial information as a precondition to negotiation

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regulatory pressure associated with the Time Warner/AOL merger, amounts to the open access that the law currently requires.

(3) Restriction of interconnecting companies to Internet access sales only, precluding a range of other intermediary services and functions provided by ISP to the public (e.g. no ITV functionality)

(4) Restriction of service to specified appliances (retarding competition for video services)

(5) Control of quality by the network owner for potentially competing video services

(6) Right to approve new functionalities for video services

(7) A large nonrefundable deposit that would keep small ISPs off the network

(8) A minimum size requirement that would screen out niche ISPs

(9) Approval by the network owner of the unaffiliated ISP's home page

(10) Preferential location of network owner advertising on all home pages

(11) Claim by the network owner to all information generated by the ISP

(12) Demand for a huge share of both subscription and ancillary revenues

(13) Preferential bundling of services and control of cross marketing of services

(14) Applying ISP must adhere to the network operator's privacy policy

In implementing its much ballyhooed memorandum of understanding, AOL Time Warner made it clear that they would write the rules of their competitors' business operations. The iron fist they negotiated with was the threat of walking away from the table; they had nothing to lose should they decide they were not interested in providing access after all. First, they required ISPs to "prequalify" for interconnection, forcing them to divulge sensitive commercial information to Time Warner.[41] Time Warner's approach

[41] "Letter to Steve Heins from Bonnie Blecha, Time Warner Cable," August 2, 2000. The information demanded included

to open access involved a process in which the cable company controls the provision of service. Even before the negotiations began, Time Warner made it clear that it would decide whether or not access was granted. [42]

AT&T's initial commitment to open access exerted a similar control over unaffiliated ISPs. [43] Recent statements by AT&T officials involved in its open access trials make it clear that they are relinquishing little control of the network and intend to set the conditions of access to serve its interests.[44]

Time Warner imposed general terms and conditions that severely reduced the ability and incentive of unaffiliated ISPs to try to enter the broadband Internet market through service provided over cable facilities. Video streaming services, which could compete directly with the cable industry's core product has been walled off from

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> Time Warner areas that you wish to serve; we would expected [sic] you to provide facilities to the Time Warner Cable headed in those areas.
>
> General information about your company:
>
> 1. Product offering
> 2. Are you currently offering any broadband services
> 3. Number of subscribers currently served
> 4. How long in business
> 5. Ownership of company
> 6. Basic financial information
> 7. Current service areas
> 8.

[42] "Letter to Steve Heins from Bonnie Blecha, Time Warner Cable," August 2, 2000.

> We received your e-mail on August 1, 2000 and **may** be interested in working with you to offer your internet [sic]service over our broadband cable systems. It would be helpful to us, **to determine if you might be a good fit**, if you would provide us with some basic background information regarding your company.

[43] The commitment included the declaration that

> Any such opportunities will be subject to terms and conditions to be agreed upon by the parties which will address, as appropriate, but not be limited to issues such as pricing, billing customer relationship, design of state page, degree of customization, speed, system usage, caching services, co-branding ancillary services, advertising and e-commerce revenues, and infrastructure costs.

[44] Goodman, Peter S., "AT&T Puts Open Access to a Test," *Washington Post*, November 23, 2000 (hereafter Goodman).

competition with anticompetitive pricing, marketing and operating terms. The term sheet restricted the service that could be offered to Internet access and defined how it could be provided.[45] Internet service providers take umbrage at the apparent preclusion of their operating as application service providers.

Most egregiously, Time Warner keeps a chokehold on real competition by demanding control over valuable first screen real estate and by demanding rapacious revenue shares from the non-affiliated ISP. It retains the right to approve the ISP home page and demands to have a prominent "above the fold" spot on the home page over which Time Warner retains complete control. AT&T not only plans to maintain significant control over the home screen, it plans to link that to a preferred browser.[46]

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[45] Time Warner Term Sheet,

> 1.Service: The "Service" will be ISP's Internet access, content, applications and functionality delivered over TWC's broadband cable infrastructure, as jointly provided by the parties within the Network Architecture to be specified by TWC in the Definitive Agreement.

[46] Goodman,

> But as a demonstration of the software last week made clear, AT&T's logo will remain an immutable part of every screen, flanked by menus that beckon customers with links to web sites for local news and shopping – AT&T's commercial partners, who will share revenues.
>
> "We are not going to become invisible," said Susan K. Marshall, senior vice president of data services at AT&T Broadband, who is overseeing the Boulder trial. "To get to the Internet, you have to do something with that globe. It puts the brand in the customer's mind… so that I have the ability to drive some additional revenues.
>
> But some ISPs say AT&T's digitally engraved logo and unwillingness to fully relinquish the customer's first screen undermines its commitment to open access.
>
> "This whole test in not about interoperability," said Douglas H. Hanson, chief executive of RMI.net Inc., a Denver-based ISP that is participating in the trial. "It's about, 'How can we put up a smoke screen to satisfy the regulators to prevent regulation of cable access. ' This is subterfuge…
>
> AT&T has also designed its own Web browser that will pop up when customers click on the "Internet" window. Those savvy enough to navigate the system without instructions will be able to use familiar browsers such as Microsoft's Internet Explorer or Netscape. But AT&T's software will encourage customers to use its browser.
>
> The reason for this subtle positioning is the value of owning the first screen…

D. ANTICOMPETITIVE CONDUCT PERVADES THE INDUSTRY

Ironically, in an effort to defend the competitive advantage of having its prime competitor subject to an open access obligation, the cable industry devotes a great deal of attention to describing how the telephone companies could leverage their market power in the local telephone market into a competitive advantage in the complementary high-speed Internet access market. AT&T identifies four forms of anticompetitive leveraging -- bundling, price squeeze, service quality discrimination, and first mover advantage. It provides a road map to the anticompetitive behavior in which the cable industry has engaged in rolling out its high-speed Internet service. Each of the four avenues that cable companies assert could be used by telephone companies to leverage their market power in their core market has already been exercised by cable companies.

Bundling: The cable companies argue that local telephone companies would bundle local telephone service with high-speed data service to undermine competition.

> If competitors lacked the ability to offer both voice and data over a single loop, they would be at severe competitive advantage [sic] in the vast majority of the nation where there is no other facility over which both services can be provisioned. Continued regulation is therefore necessary to prevent incumbent LECs from further entrenching their voice monopolies.[47]

It appears that the link that that is most critical in the development of integrated multimedia services is the link between information services and video. A much better case can be made that if competitors lack the ability to offer information and video over a single wire, they would be at a severe competitive disadvantage in the vast majority of the

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> Thus, if AT&T's flashing logo and its browser become – as the company hopes – vehicles to lure customers to sites run by its partners, the dollars it collects will come at the expense of ISPs that otherwise would have claimed the revenue.

[47] AT&T, pp. 93-94.

nation where there is no facility over which both service can be provisioned. Regulation is therefore necessary to prevent incumbent cable companies from further enhancing their video market power.

This is especially true in light of the fact that the cable companies are aggressively bundling cable TV service with high-speed Internet access to accomplish exactly the same thing. Cable operators offer a $10 discount for customers who take a bundle of cable TV and high-speed Internet access. This is a 20 percent discount off of the market price of high-speed Internet access.[48] They are leveraging their market power over cable video into the high-speed Internet market.

Price Squeeze: AT&T describes the potential for price squeeze as follows:

> Retention of existing access regulation is also necessary to prevent incumbent LECs from leveraging their bottleneck monopolies into nascent advanced service 'offered over the same bottleneck facilities…' This strategy entails setting the unbundled price of the basic local service and the price of the incremental cost of supplying the DSL service alone. In this scenario, the direct effect of the conduct is to squeeze out the competing suppliers of the enhanced service that might otherwise serve as attractive complements to the basic services offered by the incumbent LEC.

To the extent that any cable operators have voluntarily negotiated with unaffiliated ISPs, they have insisted on extremely high charges for access that render it impossible for competitors to effectively enter the market. The Time Warner Term sheet establishes a high price floor under sales of Internet service to cable TV customers. The Time Warner Term Sheet demanded 75 percent of subscriber revenues and 25 percent of ancillary revenues. This squeezes the margin on such customers and renders potential video stream

[48] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, January 14, 2000, Table B-10 shows the bundling discount for the vast majority of cable operators. In the instant proceedings, the comments of Earthlink provide an

competitors vulnerable to price squeeze.[49] ISPs are also concerned that Time Warner also proposes to charge for bit consumption, rather than minimum speeds.[50] This would make video streaming a very expensive proposition.

Smaller ISPs have complained about minimum payments.[51] They are also concerned about a one-year minimum subscriber level required by Time Warner.[52]

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example of an Excite@Home advertisement that declares that non-cable subscribers may be charged more than cable subscribers.

[49] Time Warner Term Sheet

> Subscriber Revenue Splits. TWC shall retain seventy-five percent (75%) of gross Service subscription revenues and ISP shall receive twenty-five percent (25%) thereof. Notwithstanding the foregoing, for subscriptions to the lower tier Service: (a) TWC shall receive a minimum monthly payment of $30 for each subscription sold by ISP to existing TWC cable television service subscribers; and (b) ISP shall receive a minimum monthly payment of $10 for each subscription sold by TWC. TWC shall be entitled to higher minimum monthly payments, specified in the Definitive Agreement, with respect to subscriptions sold by ISP to customers who are not TWC cable television service customers.

[50] Time Warner Term Sheet,

> The "Service" will be ISP's Internet access, content, applications and functionality delivered over TWC's broadband cable infrastructure, as jointly provided by the parties within the Network Architecture to be specified by TWC in the Definitive Agreement. The Service will be tiered based on a maximum line speed and overall consumption of bits per billing period. Initially, the parties will offer two tiers of Service. The maximum line speeds for the lower tier Service will be 2mbps, downstream, and 384 kbps, upstream. Line speeds for the initial higher tier of Service, and bit consumption for both initial tiers of Service will be specified in the Definitive Agreement.

[51] Time Warner Term Sheet,

> Advance. ISP will pay TWC an advance payment to be recouped against revenues to be received by TWC under the Definitive Agreement in the amount of dollars ($___) for each Operator which the parties agree shall offer the Service (the "Advance"). The Advance will be due and payable thirty (30) days following ISP's receipt of notice from TWC that the Pre-Existing Obligations have terminated. The Advance will be applied to revenues due to TWC hereunder until such advance had been fully recouped, at which time TWC and ISP shall make appropriate payments as set forth herein. The advance is refundable upon expiration of the Agreement, provided however that in the event the Definitive Agreement terminates for any reason before TWC has earned at least $50,000. TWC will be entitled to retain an amount equal to the difference between $50,0000 and the actual amounts earned by TWC under the Definitive Agreement.

[52] Time Warner Term Sheet,

> Minimum Subscriber Level. TWC will have the right to terminate the Definitive Agreement with respect to any particular Operator after one year from the commencement of rollout by such Operator unless the Service has, upon the one-year anniversary of the rollout, in such

Quality Discrimination: AT&T argues that local telephone companies can offer lower quality service to unaffiliated ISPs, thereby gaining an advantage for their affiliated ISP.

> Allowing incumbent LECs to bundle basic services with enhanced service provided [sic] over bottleneck facilities could also better enable them to squeeze out efficient potential competitors through non-price means – e.g. by offering lower quality monopoly bottleneck service to customers of their competitors, and by provider quicker or more complete disclosure of their network interface specifications and protocols to favored venders. That is so because bundling potentially 'covers up' discrimination.

Cable operators have continued to insist on restrictions on the quality of service offerings that unaffiliated ISPs could make that place them at a competitive disadvantage. In the Terms sheet, Time Warner leaves video streaming functionality up in the air. Quality of Service–critical to video streaming—will not be guaranteed by Time Warner, but rather is subject to "further negotiations."[53] New functionalities must be approved by Time Warner, whether or not they place any demands on the network.[54]

Operator's operating area, a number of subscribers equal to the greater of (a) 100 or (b) .5% of homes passed by the particular Operator.

[53] Time Warner Term Sheet,

> Video Streaming: Telephony. Video streaming and telephony will be permitted as part of the Service, subject to the following provisions:
>
> TWC will not be required to provide QoS support for telephony or video streaming for the Service QoS may be provided upon request and at an additional cost.

[54] Time Warner Term Sheet,

> To the extent ISP wishes to offer any functionality as part of the Service which: (a) is outside the scope of the Network Architecture; (b) requires an Operator acquire equipment or software or implement a change in the way the Operator processes, TWC shall have the right to approve such new functionality , provided however that in the event TWC approves such functionality, ISP will be obligated to reimburse for TWC its direct, out-of-pocket costs in implementing such new functionality.

AT&T's control of the architecture is just as explicit. It will pick and choose which service providers will get the fastest speeds. The favored service provider will be those affiliated with AT&T.[55]

First Mover: AT&T describes the first mover advantage that LECs might seek to gain as follows,

> Finally, if the incumbents were exempt from regulation merely because they are using their bottleneck facilities to provide advanced service, they could simply migrate captive local telephony customers to DSL before cable telephony or any other alternative to these monopoly services is available. Then the LECs could exploit their telephony monopoly over local customers without regulation, by means of pricing of local service to end-users as well as pricing of access to long distance providers, all under the rubric of "advanced services" offerings.

Cable operator exclusive contracts will certainly give them a leg up on the first 5 to 10 million plus subscribers before any ISPs have access to their networks.

Without an obligation to provide open access, there will be nothing to preserve even these meager commitments once the current public pressure is gone. The

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[55] Goodman,

> Founder Joe Pezzillo worries that the competitive gap could widen as broadband brings new business models.
>
> He envisions AT&T making deals with major music labels to deliver its own Internet radio, with AT&T providing the fastest connections to its partners and slower connections to sites like his. "Someone is not going to wait for our page to load when they can get a competitor's page instantly," Pezzillo said.
>
> AT&T says it has yet to formulate business models with partners, but the software the company has designed for the Boulder trial – demonstrated at its headquarters in Englewood, Colo. Last week – clearly includes a menu that will allow customers to link directly to its partners. Company officials acknowledge that AT&T's network already has the ability to prioritize the flow of traffic just as Pezzillo fears.
>
> "We could turn the switches in a matter of days to be able to accommodate that kind of environment," said Patrick McGrew, an AT&T manager working on the technical details of the Boulder trial.
>
> Though the Boulder trial is focused on technical issues alone, AT&T will study the way customers navigate the system as it negotiates with ISPs seeking to use its network…

marketplace certainly will not induce the cable industry to forgo the very profitable abuse of its market power that has typified the past two decades. Nondiscriminatory access is simply not part of the cable industry's business model and never has been. It would not be part of the telephone industry model, if open access were not required of it. To the extent that access by unaffiliated entities has ever been granted on nondiscriminatory terms to either of these networks, it has been mandated by Congress and implemented by the Commission.

Without such action here, the remarkably pro-consumer environment of vigorous competition between service providers on the open narrowband Internet is to be replaced by so-called "adequate" competition among facilities owners, who filter the decision about which content the public has access to through their business interests. The resulting marketplace would bear no resemblance to the truly competitive Internet that has been so successful, nor would it accomplish the public policy goal that the Computer Inquiries and mandatory open access to communications networks achieved.

IV. ECONOMICS: COMMUNICATIONS MARKETS REMAIN HIGHLY CONCENTRATED AND FAR FROM EFFECTIVELY COMPETITIVE

The previous sections demonstrate that the Commission must reject the industry efforts to push high-speed Internet access under Title I of the Act for legal and policy reasons. It must treat the transmission of information services over high-speed Internet access facilities as a telecommunications service under Title II of the Act. As such, it is subject to, at least, the section 201, 202 and 251 requirements of nondiscrimination and interconnection.

The only way the Commission could lift those requirements is to forbear from regulation. Consumer commenters believe, however, it could not do so under the standards adopted by the Congress. The issue of market power in both the cable TV and telephone industries, as well as the high-speed Internet market emerges as central to the deliberation of the Commission because the cable industry wants to have its cake and eat it too. Even though the cable industry claims that Digital Subscriber Lines (DSL) the main competitor to cable modem service, it argues that the telephone companies must be regulated to provide open access because they have market power in their core business, telephone service. Cable companies need not be similarly regulated, the cable industry claims, because the cable companies do not have market power in their core business, cable TV service.

> The current need for differential regulation arises because incumbent LECs' enduring voice monopolies raise competition issues that are not present in the cable context. As noted above, cable operators face numerous rivals who provide multi-channel video service to residential consumers. This is not the case for incumbent LECs, and telephone service. As the Commission recently recognized, incumbent LEC networks, especially the local loop, remain 'a quintessential bottleneck facility for competitive telecommunications carriers," that incumbent LECs, can, absent regulation, leverage to 'perpetuate their monopolistic dominance of existing and emerging telecommunications markets." [56]

The empirical evidence indicates there is market power in all three markets.

A. MARKET STRUCTURE ANALYSIS: DEFINING WORKABLY COMPETITIVE MARKETS

Maker power starts with market structure. Measuring concentration for purposes of market structure analysis has received a great deal of attention. Market structure analysis is used to identify situations where a small number of firms control a sufficiently

[56] Ordover and Willig, pp. 21-22)

large part of the market as to make coordinated or reinforcing activities feasible. Through various implicit and explicit mechanisms a small number of firms can reinforce each other's behavior, rather than compete. Generally, however, when the number of significant firms falls into the single digits, there is cause for concern, as the following suggests.

> Where is the line to be drawn between oligopoly and competition? At what number do we draw the line between few and many? In principle, competition applies when the number of competing firms is infinite; at the same time, the textbooks usually say that a market is competitive if the cross effects between firms are negligible. Up to six firms one has oligopoly, and with fifty firms or more of roughly equal size one has competition; however, for sizes in between it may be difficult to say. The answer is not a matter of principle but rather an empirical matter.[57]

The clear danger of a market with a structure equivalent to only six equal sized firms was recognized by the Department of Justice in its Merger Guidelines.[58] These guidelines were defined in terms of the Herfindahl-Hirschman Index (HHI). This measure takes the market share of each firm squares it, sums the result and multiplies by 10,000.[59]

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[57] J. W. Friedman, Oligopoly Theory (Cambridge: Cambridge University Press, 1983), pp. 8-9.

[58] U.S. Department of Justice, Merger Guideline, revised, 1992.

[59] Shepherd, p. 389, gives the following formulas for the Herfindahl-Hirschman Index (HHI) and the Concentration Ratio (CR):

$$H = \sum_{i=1}^{n} p_i^2$$

$$CR_m = \sum_{i=1}^{m} p_i$$

where
n = the number of firms
m= the market share of the largest firms (4 for the 4 firm concentration ratio)
p_i = the share of the ith firm.

A market with six equal sized firms would have a HHI of 1667. The Department declared any market with an HHI above 1800 to be highly concentrated. Thus, the key threshold is at about the equivalent of six or fewer firms.

Another way that economists look at a market at this level of concentration is to consider the market share of the largest four firms (called the 4-Firm concentration ratio). In a market with six equal sized firms, the 4-Firm concentration would be 67 percent. The reason that this is considered an oligopoly is that with a small a number of firms controlling that large a market share, their ability to avoid competing with each other is clear.

Shepherd describes this threshold as follows:[60]

> Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.

While six is a clear danger sign, theoretical and empirical evidence indicates that many more than six firms are necessary for competition – perhaps as many as fifty firms are necessary. Reflecting this basic observation, the Department of Justice established a second threshold to identify a moderately concentrated market. This market was defined by an HHI of 1000, which is equivalent to a market made up of 10 equal sized firms. In this market, the 4-Firm concentration ratio would be 40 percent.

Shepherd describes this threshold as follows:

> Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.[61]

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[60] Shepherd, p. 4.

[61] Shepherd, p. 4.

Shepherd also notes that a dominant firm – "one firm has 50-100 percent of the market and no close rival"[62] – is even more of a concern.[63]

Even the moderately concentrated threshold of the Merger Guidelines barely begins to move down the danger zone of concentration from 6 to 50 equal sized firms. For a "commodity" with the importance of telecommunications, certainly this moderately concentrated standard is a more appropriate place to focus in assessing the structure of the market. In other words, in simple economic markets levels of concentration typified by 10 equal sized firms are high enough to raise questions about the competitive behaviors of the firms in the market. Given the nature of the telecommunications industry and the special concern about the free flow of ideas, this is a conservative level of concentration about which to be concerned.

B. MARKET POWER PERVADES THE COMMUNICATIONS INDUSTRY

One of the great disappointments of the 1996 Telecom Act has been the failure of competition from similar and alternative technologies to break down the market power of the incumbents. Congress had great hopes for this form of competition. In fact, the only facilities-based competitor for local telephone service actually mentioned by the Act's Conference report was cable TV.[64] Similarly, Congress devoted a whole section to telephone competition for cable through open video systems.[65] Neither of these has proven effective competition. With the failure of wireline competition to develop across

[62] Shepherd, p. 4.

[63] The Department of Justice Guidelines of 1984 had a dominant firm proviso, which identified a 65 percent market share, which was dropped in the 1992 update.

[64] Pub. L. 104-104, Conference Report, p. 148.

[65] Title II, part 5.

industries, attention has focused on wireless competition. Unfortunately, wireless technologies (cellular in telephone; DBS in cable) have not proven to be effective competitors.

Exhibit 1 presents a comparison of key characteristics of residential cable TV and telephone markets. Although the incumbent telephone companies have a very high market share (97 percent), the high market share of cable companies (80 percent) exceeds the traditional standard used to conclude that they possess market power. Head-to-head wire line competition is about equal for both products (about 3 percent of the market for cable and 1 percent for telephone). The primary wireless technology has achieved a much higher penetration for telephone service than for cable. However, we have demonstrated in this proceeding and its antecedents and show below that wireless is not an effective substitute for wire line telecommunications because of price and service offerings. The same is true for cable. Satellite does not constrain cable.

1. Cable TV

The Telecommunications Act of 1996 has failed to establish wire-to-wire competition for cable TV service. Open video systems are virtually non-existent. [66] Overbuilding has failed to serious challenge the cable wire monopoly.[67] The incumbent cable TV companies virtually never compete with one another. There is an effective noncompete understanding between the members of the industry. To our knowledge,

[66]In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Seventh Annual Report, CS Docket No. 00-132, January 8, 2001 (hereafter, Seventh Annual Report), Table C-1 shows OVS at a constant, 60,000 subscribers.

[67] Seventh Annual Report, pp. 20-22.

there is not one case of an incumbent cable company extending its network by seeking to overbuild a neighboring system.

The only telephone company that has pursued large scale entry into the cable business as a plain overbuilder – Ameritech – has been bought out by another telephone company – SBC – that tried the cable business and did not like it. SBC entered and exited the cable business before it acquired PacBell. It subsequently took PacBell out of the cable business, after it acquired the company. It cut back on Southern New England Telephone company's cable business. The FCC now recognizes that telephone companies are exiting this business.[68]

Other overbuilders have made little progress. Since the passage of the 1996 Act, it appears that fewer than five percent of television households have been passed by overbuilders and about one percent of households have subscribed to overbuilders.[69] In other words, incumbent cable companies have approximately 97 percent of the wireline multichannel video market. This is roughly equivalent to the incumbent telephone company share of the wireline voice market.

Satellite has severe limitations in competing with cable TV service. DBS's large channel capacity and high front-end costs dictate the packaging of large numbers of high priced channels and/or long term contracts. As a result, DBS is a small competitive fringe that is not capable of disciplining cable TV pricing. DBS still costs substantially more

[68] Seventh Annual Report, pp. 55-58.

[69] The Seventh Annual report presents data on overbuilders that account for about one-third of the national total added since the passage of the 1996 Act. The ratio of homes passed and subscribers to households in the franchise area is used to project national totals. This may be too optimistic, since the identified companies are among the more aggressive and the remainder of overbuilders may not perform as well.

than cable does. Even in the midst of the debate over delivery of local stations by satellite, the largest satellite provider eschews price competition for the basic package.[70]

Exhibit 2 is drawn to scale to give a feel for the structure of the multichannel video programming distribution market (MVPD) as defined by the Department of Justice and the Federal Communications Commission. DBS has a small market share of the MVPD market – less than 16 percent. More importantly, because of its limitation in delivering local broadcasting, a substantial number of DBS subscribers (approximately 25 percent) also subscribe to cable. Thus, only 12 percent of MVPD households have DBS and not cable. DBS fills a niche at the high end of the market. Many subscribers buy cable in order to get a full complement of local programming. Cable has continued to grow in penetration, even as satellite has expanded its base (see Exhibit 3).

The repeated claims that satellite disciplines cable TV market power has been rejected by the FCC in its most recent analysis of pricing.[71] In that analysis, the effect of

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[70] Mundy, Alicia, "The Price of Freedom," *MediaWeek*, March 29, 1999., p. 32.

> Congress has been moving at an unusual speed to pass a bill that would give DBS providers the right to beam local network signals to local subscribers…
>
> "It's not a cure-all," said Hartenstein, who has run DirectTV since its inception in 1990. For one thing, Hartenstein's business plan is not based on beaming local network signals to his customer base, soon expected to top 9 million. Instead, he is suggesting that subscribers buy new antennas to supplement their coverage. DirecTV is working with retailers to have the specialized antennas available at reduced prices. He calls this program "Distant/Terrestrial," meaning he sends you all the cable and movie channels you could dream of (for which he can charge), and you pick up the free network feeds with an extra antenna.
>
> Furthermore, Hartensteins' game plan does not include fighting for cable customers by undercutting cable prices. Analysts for the DBS and cable industries have figures out that the average American homeowner will cough up $30 per month for TV. Above that level, both camps believe, many consumers will bolt and run. Hartenstein seems determined to compete on quality and depth of service, not price.

[71] In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment, MM Docket No. 92-266, June 15, 2000, p. 5.

satellite penetration was not statistically significant. Furthermore, the analysis found that satellite continues to be successful in rural areas, where cable services are least available. In other words, as we have demonstrated in comments filed in this proceeding and its antecedents, satellite does not compete with basic service and does not discipline prices.

Taking these factors into account, it is not surprising to find that the elasticity of demand for cable service estimated by the FCC is quite low – just 1.3. This means that the threat of abuse of market power is substantial. The presence of DBS has done nothing to restrain cable price increases. They have been as rapid, in real terms, as at any time during the history of the industry. Cable makes much more money by increasing prices for basic cable than competing in the DBS niche, especially now that they can add cable modem service to the package. The revenue gained by increasing cable prices to existing subscribers since the Telecom Act of 1996 exceeds the revenue lost to all DBS-only subscribers by almost 3-to-1 and new DBS-only subscribers by almost 4-to-1. Cable revenues added from new subscribers <u>at the higher prices</u>, just about equaled cable revenues lost to all DBS-only subscribers and exceed cable revenues lost to new DBS-only subscribers.[72]

The market power that is being exercised by cable TV is most readily apparent in the very substantial real price increases that the industry has imposed on consumers since

[72] The pricing strategy was apparent to some industry observers, as a Cisco publication noted (Abe, George, *Residential Broadband* (Cisco Press, Macmillan Technical Publishing, 1997), p. 217).

> Cable MSO management apparently agrees it is necessary to get more from each subscriber. Since the passage of the Telecom Act of 96, cable operators have taken the opportunity to raise subscription rates more than twice as fast as the consumer price index, clearly not a strategy for getting new households.

the passage of the 1996 Act (see Exhibit 4). The only commodity that rivals cable rates for real increases in recent years is oil prices.

The addition of high priced broadband Internet services will do nothing to change this picture. In fact, it will likely make matters worse.[73] By adding services at the high end, cable operators will be able to attack the high-end niche that satellite occupies. Satellite's high costs prevent it from attacking the cable base.

2. The Failure of Competition in Local Telephone Service

Throughout October 2000, AT&T conducted a flurry of board meetings, press conferences and conference calls with Wall Street analysts to explain its decision to break itself up into three companies.[74] The admission that its business strategy had failed was obviously bad new for AT&T stockholders, but it was even worse news for telephone consumers. It signaled the failure of the federal Telecommunications Act of 1996 to deliver local phone competition.

AT&T had justified its purchases of cable TV companies to regulators and bankers by claiming that local telephone competition over cable wires could be provided only as part of an integrated package of voice, video and data services.[75] It had promised to use

[73] CFA, Time Warner AOL opposition.

[74] Cooper, Mark, "Picking Up the Public Policy Pieces of Failed Business and Regulatory Models," presented at *Setting The Telecommunications Agenda,* Columbia Institute For Tele-Information, (November 3, 2000).

[75] *Application for Consent to Transfer of Control of Licenses and Section 214 Authorization from Telecommunications, Inc., Transferor, to AT&T Corp., Transferee, Public Interest Statement,* Federal Communications Commission, CS Docket No. 98-178; *Application for Consent to Transfer of Control of Licenses and Section 214 Authorization from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Public Interest Statement,* Federal Communications Commission, CS Docket No. 99-251.

the tens of millions of cable lines it was buying to compete for local telephone service.[76] Now AT&T is going in the opposite direction. The company is splitting the cable business from the telephone business from the wireless business, and creating a separating tracking stock for its consumer long distance business.

Policymakers desperately wanted wire-to-wire competition to justify the assumptions of the 1996 Telecom Act. Unfortunately for these aspirations, convergence of video and voice is an unproven strategy that lacks a sound basis in market reality. The difficulties of providing switched telephone service over cable networks render such activity uneconomic.[77] It appears that two separate networks, each optimized around very different functionalities, make perfect economic sense, for three legitimate reasons.[78]

- Functional specialization is a sound economic principle, especially when there are diseconomies of integration between switched and non-switched services. It costs too much to make one network do very different things.

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[76] This was always a dubious proposition, see Consumers Union, Consumer Federation of America and Media Access Project, *Breaking the Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Services* (August 17, 1999).

[77] The local exchange companies recognized the difficulty that cable companies would have in providing telephone service. Bell Atlantic described the problems in detail in its aborted attempt to purchase TCI. (See Bell Atlantic's Request for an Expedited Waiver Relating to Out-of-Region Interexchange Services and Satellite Programming Transport, *United States of America v. Western Electric Company, Inc., and American Telephone and Telegraph Company*, Civil No. 82-0192 (HHG) January 20, 1994. The request consists of six parts, the request itself and five affidavits (Affidavits in Support of Bell Atlantic's Request for an Expedited Waiver Relating to Out-of-Region Interexchange Services and Satellite Programming Transport, January 20, 1994. Individual affidavits include Alfred E. Kahn and William E. Taylor; Gary S. Becker; Robert W. Crandall; Robert G. Harris; and Brian D. Oliver. Ironically, prior AT&T management apparently reached the same conclusion. However, current AT&T management confesses to being unaware of these analyses (Cauley, Leslie, "Armstrong's Vision of AT&T Cable Empire Unravels on the Ground," *Wall Street Journal*, October 18, 2000). At least one cable company has publicly admitted that it cannot pursue a typical telephone service (circuit switched telephony) and will have to try to provide Internet telephony, although there are no guarantees when, or whether, this approach will be viable for basic telephone service (Comments of Joe Waz at Setting The Telecommunications Agenda, Columbia Institute For Tele-Information, November 3, 2000).

[78] It was always a dubious proposition. See Cooper Mark, *Expanding the Information Age in the 1990s: A Pragmatic Consumer Analysis (*Consumer Federation of America and American Association of Retired Persons, January 1999*); Developing the Information Age in the 1990s: A Pragmatic Consumer View* (Consumer Federation of America, June 8, 1992)

- "One-stop-shopping" sounded like a good idea but it was not compelling when one-click shopping is available for almost anything. Consumers are not clamoring for one huge package of voice, video and data services.

- Goal planning, setting and achieving is much more difficult. It is much more challenging to sell three distinct services to very different kinds of customers.

Policymakers deregulated the cable monopoly and hoped that local phone companies would face facilities-based competition so that they could also be deregulated. Specialized networks that do not compete directly for their core businesses pose a problem for policymakers. Without wire-to-wire competition, the plain old problem of monopoly power in the cable TV and local telephone networks fails to subside.[79]

Five years after the passage of the 1996 Act, prospects for facilities-based, wire-to-wire competition, on which legislators and regulators pinned their hopes for the Act, are dim at best.[80] The industrial organization and regulatory oversight of the communications industry are a shambles from the competition and consumer points of view. The situation on the ground in most local telephone markets reflects this grim reality.[81]

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[79] Consumer Federation of America and Consumer Action, *Transforming the Information Superhighway into a Private Toll Road* (, September 1999), looks at problems in both the cable TV and the telephone industries from the point of view of advanced services.

[80] The only facility mentioned in the Conference report on the Telecom Act was cable (see p. 148).

[81] The Consumer Federation of America has charted the unfolding failure of local competition at the national level and in a series of state-specific studies. See, Cooper, Mark N., *Last Chance for Local Competition: Policies to Open Markets Before Baby Bells Begin to Sell In-Region Long Distance Service* (June 17, 1997); *Affidavit of Mark N. Cooper on Behalf of the Consumer Federation of America*, before the Public Utility Commission of California R.93-04003, I.93-04-002, R.95-04043, R.85-04044, June 1998; Consumer Federation of America and Consumers Union, "Reply Comments," before the Federal Communications Commission, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Etc.*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD Docket No. 98-15, RM 9244, October 18, 1998; The Consumer Stake in Vigorous Competition in the Illinois Local Telephone Market, March 1999). See also, Cooper, Mark, *Situation Report on Local Competition in New Jersey*, November 1998.

Across the nation, new entrants to the local phone have been unable to crack the local telephone monopoly to any significant extent. CLECs have captured just under 7 percent of the total local lines in the country, but for residential and small business consumers the figure is about 3 percent.[82] Worse still, most of this competition is not with new wires. Wire-to-wire competition accounts for only about 1 percent of the total number of lines nationwide and in the residential and small business sector, it is less than one percent.[83] In other words, the incumbent monopolists still have a complete stranglehold on local telephone wires.

The failure of new entrants to break the monopoly of the incumbents is reinforced by the failure of incumbents to compete against one another, just as in cable. It was hoped that the large incumbent local monopoly companies might attack their neighbors' service areas, as they are the best situated to do so. But such competition has not happened.[84] The ILECs have simply not tried to enter each other's service territories in any significant way.

In fact, they have done quite the opposite. Rather than compete they have merged. Before the 1996 Act was passed, the largest four ILECs owned less than half (48%) of all

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[82] Industry Analysis Division, Common Carrier Bureau, *Local Telephone Competition at the New Millennium* (Federal Communications Commission, December 2000) (hereafter, *Local Competition 2000*, p. 1.

[83] Based on ratios in Industry Analysis Division, Common Carrier Bureau, *Local Competition: August 1999* (Federal Communications Commission, August 1999) (hereafter *Local Competition 1999)*, which gives the most recent available data on residential versus business wire-to-wire competition.

[84] Reply Comments Of The Consumer Federation Of America, Consumers Union, And AARP, before The Federal Communications Commission, Proposed Transfer Of Control SBC And Ameritech, CC Docket No. 98-141, November 16, 1998); Citizen Action of Indiana, et al., *The Consumer Case Against the SBC-Ameritech Merger* (January 20, 1999).

the lines in the country.[85] Today, the largest four local telephone companies own about 85% of all the lines in the country.[86]

Wireless telephone service technologies have not solved the problem of lack of competition for local service and will not any time soon. Cellular phones have become popular, but this service is no substitute for basic telephone service. People buy this distinct product for varied reasons. Even though the price of wireless has come down, for the average consumer, wireless costs about five times as much as local service.[87]

The proof that wireless and basic wireline services occupy different product spaces can be seen in the numbers of consumers subscribing to each (see Exhibit 5). Both wireless and wireline have been growing at strong rates. In fact, since the 1996 Act was passed, the number of local access lines has grown faster than at any time since the 1984 break-up of the AT&T system. Local exchange revenues have been growing twice as fast as other wireline revenues, and faster than they had in the in the first half of the 1990s.[88]

Although wireless telephony has achieved a substantial market penetration, it does not compete with wireline service for the overwhelming majority of consumers. Cellular costs the average residential consumer several times as much as local exchange service costs and is attractive to, at most, a small percent of residential subscribers. Cellular is much more expensive than basic local service and priced in a fundamentally different fashion.

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[85] FCC, *Statistics of Common Carriers, 1995/1996,* Tables 1 and 2.5.

[86] FCC, *Statistics of Common Carriers, 1998.1999, Tables 1 and 2.5,* adjusted for Bell Atlantic/GTE merger and CLEC line count.

[87] Comments of the Consumer Federation of America.

[88] Federal Communications Commission, *Trends in Telephone Service, 2000* (March 2000); Federal Communications Commission, *Statistics of Common Carriers* (various issues).

The basic monthly charge for cellular offerings is much higher than basic monthly wireline rates. The average flat rate telephone is in use for local calling about 1300 minutes per month.[89] The average monthly charge is about $20 per month. The average cost per minute of use is $.015. Assuming half the usage is outgoing, the cost per minute of a call made is $.03. This is much less than average cost of cellular calling plans, which run in the range of $.10 to $.15 per minute. Cellular service is measured service; local exchange service is generally flat rate. Cellular service does not allow extension phones. Cellular charges not only for outgoing calls, but also for incoming calls, which is never the case with wireline service. For the average consumer, cellular is out of the question as a substitute for local exchange service.

The solution, of course, is not to use the cellular for local calls. Rather, use it for long distance, outgoing calls, plus travel. Could such a dedicated long distance line replace one of the local wirelines? Local usage is not alleviated, nor is an Internet connection replaced. The wireline is not replaced. Thus, although cellular has achieved a high market penetration, it does not represent an economic substitute for wireline local telephone service. It is a different commodity that provides different functionality.

3. High Speed Internet Access

High-speed Internet for residential customers is dominated by cable modem service. The market share in that market again exceeds level deemed adequate to convey market power. The current availability of cable is about twice as high as that of the second technology, DSL. Further, many telephone lines cannot deliver high-speed

[89] Industry Analysis Division, *Trends in Telephone Service*, December 2000.

Internet because of long loops or telephone equipment that renders the service inoperable. Wireless technologies are not widely available.

Measured on a national basis, the high speed Internet market is certainly highly concentrated. In fact, using the only measure of local markets that the FCC has made available (zip codes), we conclude that competition is far from vigorous (see Exhibit 6).

Less than one percent of markets qualify as unconcentrated (ten or more firms),

3 percent of the markets qualify as moderately concentrated,

20 percent qualify as highly concentrated oligopolies,

19 percent are a duopoly,

28 percent are a monopoly, and

30 percent have no high-speed access available.

Ironically, by the exact same measure of competition and markets, the local telephone market is more competitive than the high-speed Internet access market (see Exhibit 7).

3 percent of markets qualify as unconcentrated,

6 percent are moderately concentrated,

21 percent highly concentrated oligopoly,

20 percent duopoly, and

46 percent monopoly,

Of course, telecommunications is nearly ubiquitous, so there are no unserved zip codes.

The FCC does not include wireless in these calculations, although it does include satellite in its discussion of cable TV service. If wireless is included (see Exhibit 8), the

local telephone market looks decidedly less concentrated than either the cable TV or the high-speed Internet access markets, but, as previously noted, wireless should not be included since it is not an effective competitor to wireline.

Given this market structure analysis, the obvious conclusion is that the Commission has correctly concluded that local telephone companies need to remain under Title II, forbearance is unjustified, and obligations of nondiscrimination and interconnection continue to be necessary. The Commission must treat cable modem service in the same manner.

Respectfully submitted,

Texas Office of Public Utility Counsel
Consumer Federation of America
Consumers Union

EXHIBITS

SOURCES AND DEFINITIONS:

EXHIBIT 1:

Core Monopoly

Cable TV share of MVPD market based on *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Seventh Annual Report*, CS Docket No. 00-132, January 8, 2001). LEC share of local telephone wires, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000*, Federal Communications Commission, December 2000, Table 1.

Penetration Of Core Product Competition

Wire-to-Wire competition is defined as follows: Cable TV overbuilder/ LEC as reported *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, MM Docket No. 92-266, June 15, 2000, p. 5. Lines service by facilities based carriers (not UNE or resale) Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000*, Federal Communications Commission, December 2000, Table 3.

Cross technology penetration is defined as follows: Satellite, from *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, January 14, 2000) with the following updates for third quarter 2000 – 13 million satellite subscribers, a net gain of 3 million. Cellular penetration (number of accounts divided by total number of accounts) , Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000*, Federal Communications Commission, December 2000, Table 8.

High Speed Internet

Current market share from Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, Federal Communications Commission, October 2000. Broadband Intelligence, *High-Speed Internet Competition*, December 2000.

EXHIBIT 2:

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Seventh Annual Report, CS Docket No. 00-132, January 8, 2001);

Percentage of satellite households with cable is from a national random sample public opinion surveys, Consumer Federation of America and Consumers Union, *Disconnected, Disadvantaged, Disenfranchised: Explorations in the Digital Divide*, October 5, 2000.

EXHIBIT 3:

Paul Kagan, *Pay TV Subscriber History*, various years; *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, various years.

EXHIBIT 4:

Price increases are Bureau of Labor Statistics, *Consumer Price Index*, February 1968 to 2000, for cable TV service and local service

EXHIBIT 5:

Industry Analysis Division, *Trends in Telephone Service*, various issues.

EXHIBIT 6

Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, Federal Communications Commission, October 2000. Broadband Intelligence, *High-Speed Internet Competition*, December 2000.

EXHIBIT 7

Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, Federal Communications Commission, October 2000. Broadband Intelligence, *High-Speed Internet Competition*, December 2000.

Local telephone wires, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000*, Federal Communications Commission, December 2000.

EXHIBIT 8

Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, Federal Communications Commission, October 2000. Broadband Intelligence, *High-Speed Internet Competition*, December 2000.

Local telephone wires, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2000*, Federal Communications Commission, December 2000.

Cable: *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Seventh Annual Report*, CS Docket No. 00-132, January 8, 2001)

EXHIBIT 1:
COMPARISON OF STATUS OF COMPETITION IN RESIDENTIAL MARKETS:
CABLE TV, LOCAL TELEPHONE AND HIGH-SPEED INTERNET

	CABLE TV	LOCAL TELEPHONE
Core Monopoly		
Market Share (% of Subscribers)	80	97
Penetration of Core Product Competition		
Wire-to-Wire Competition (% of Subscribers)	3	1
Cross Technology Wireless (% of Accounts)	16	75
High-Speed Internet		
Current Market Share (% of Current Subscribers)	70	25
Current Availability (% of Total Households)	46	24

EXHIBIT 2
MARKET SHARE AND MARKET OVERLAP
IN THE MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION MARKET

TELEVISION HOUSEHOLDS

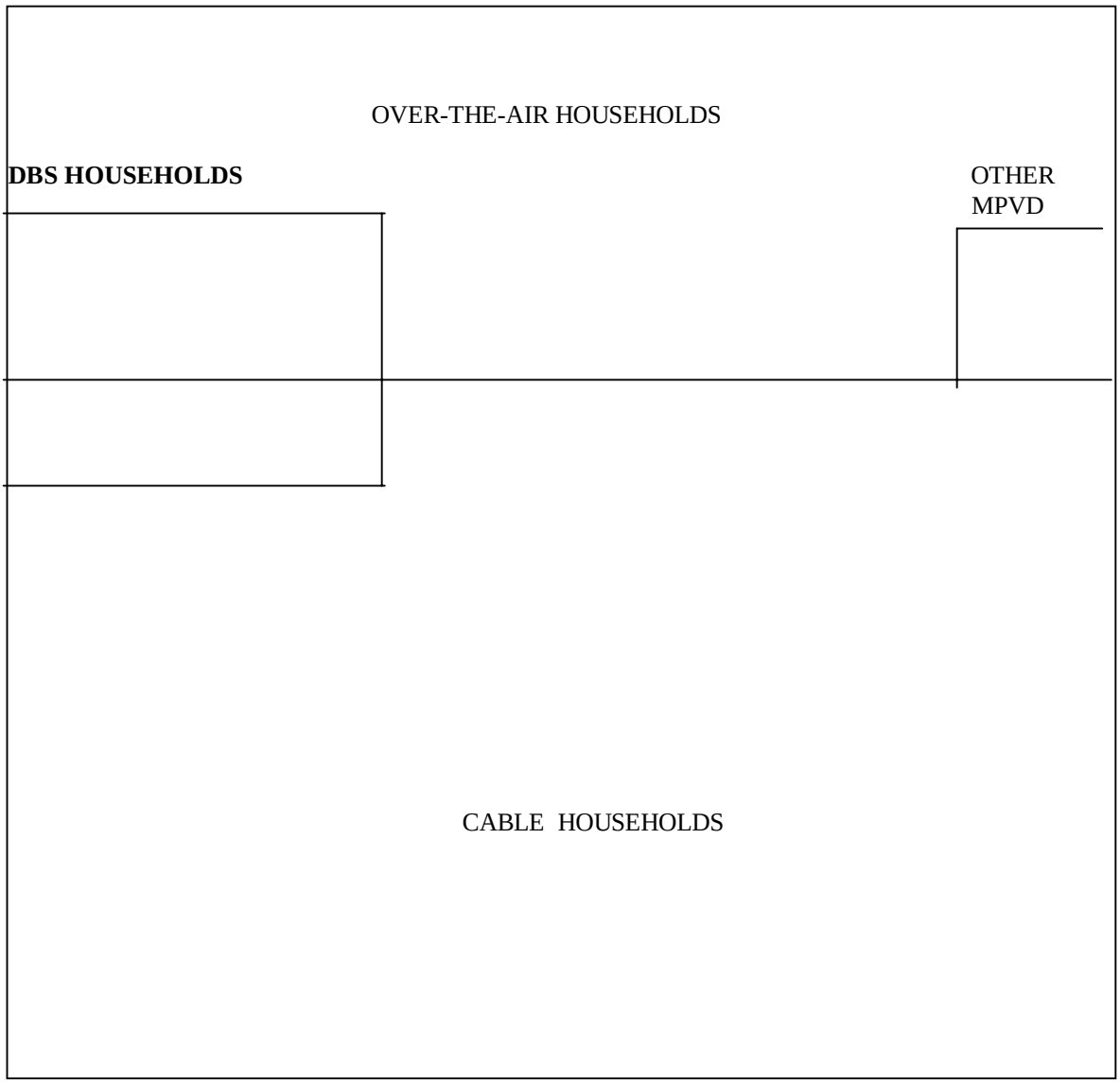

EXHIBIT 3:
CABLE TV AND SATELLITE SUBSCRIBERS

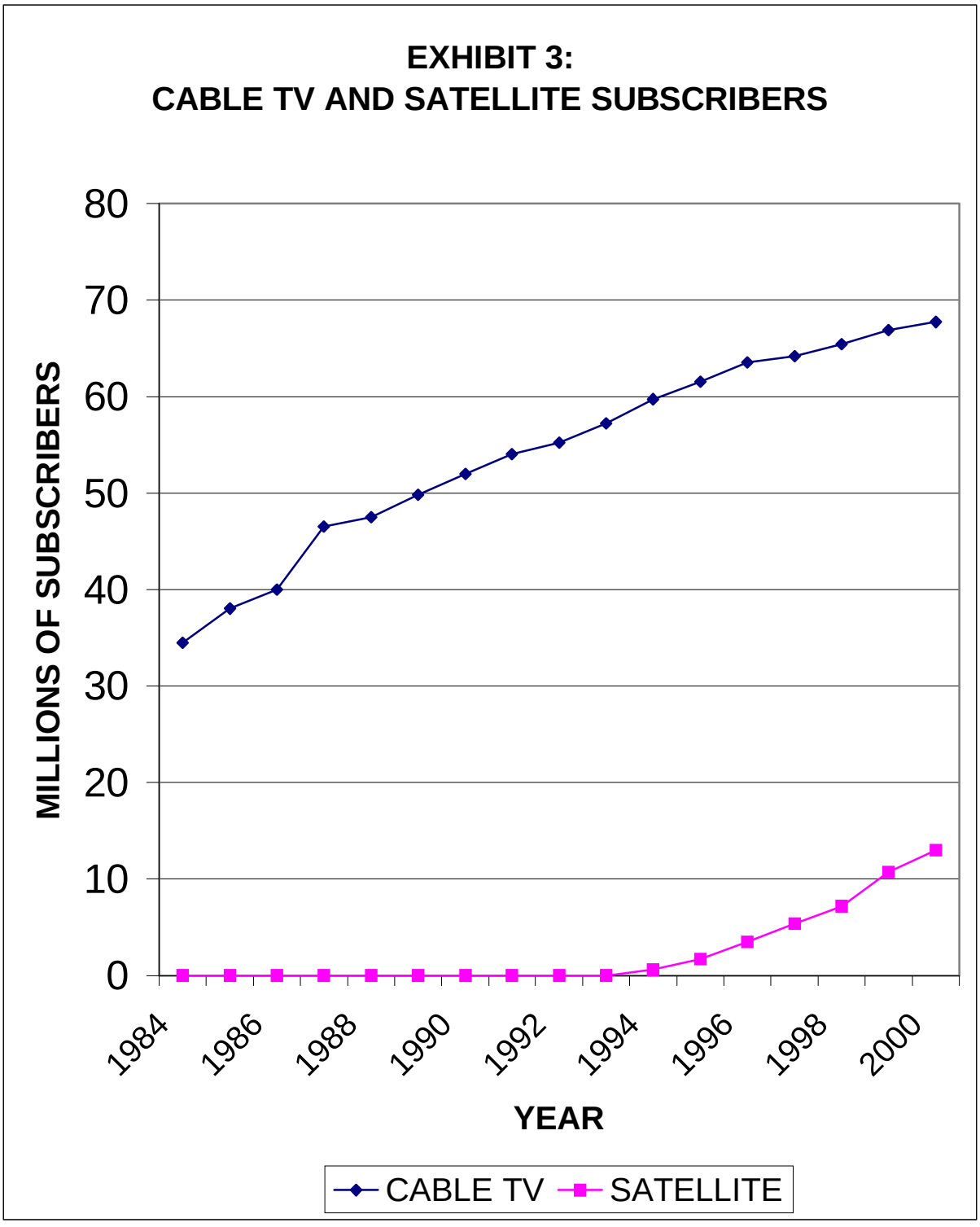

EXHIBIT 4:
PRICE CHANGES AFTER THE 1996 ACT

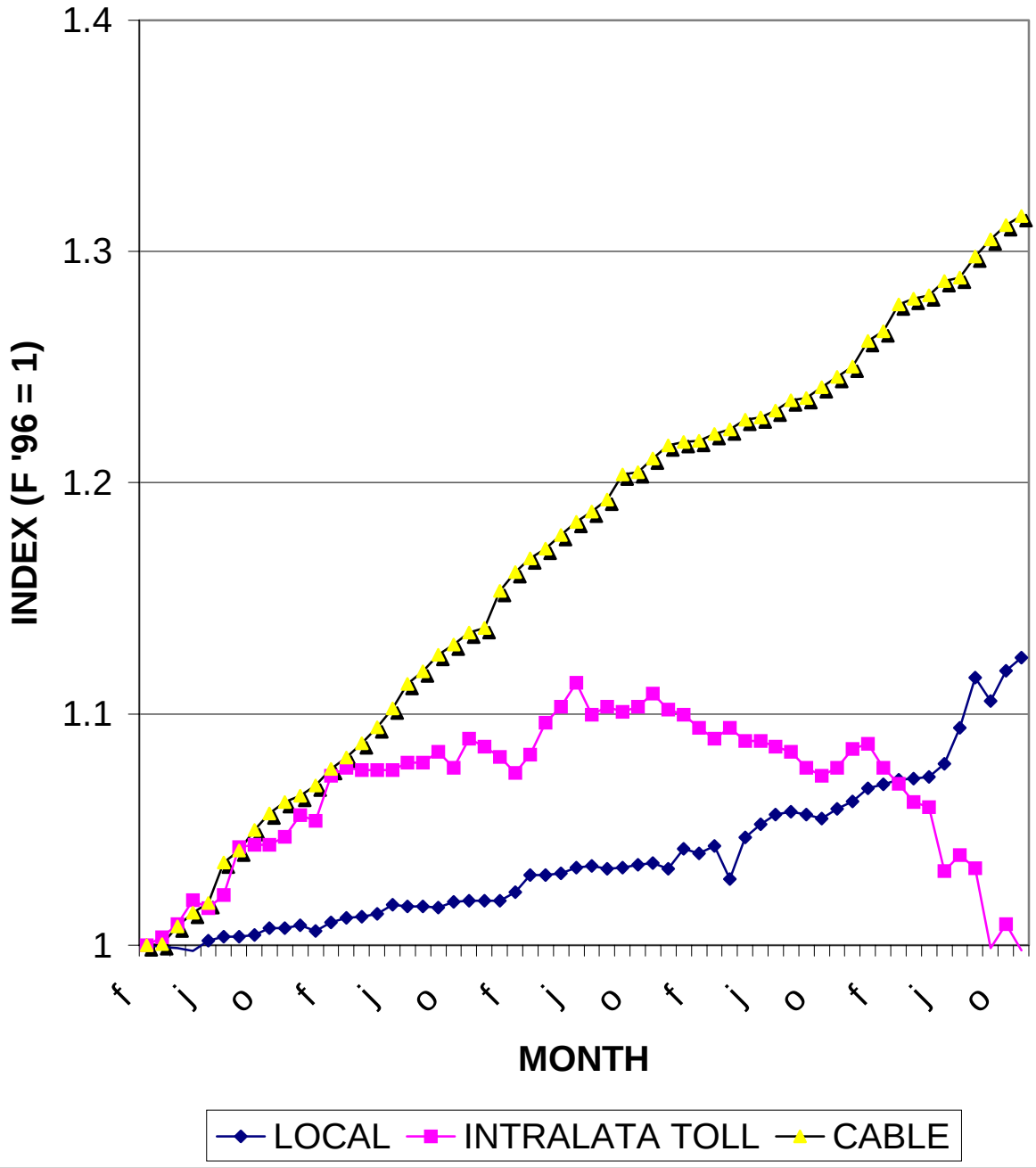

FIGURE 5:
GROWTH OF ACCESS LINES AND CELL PHONES

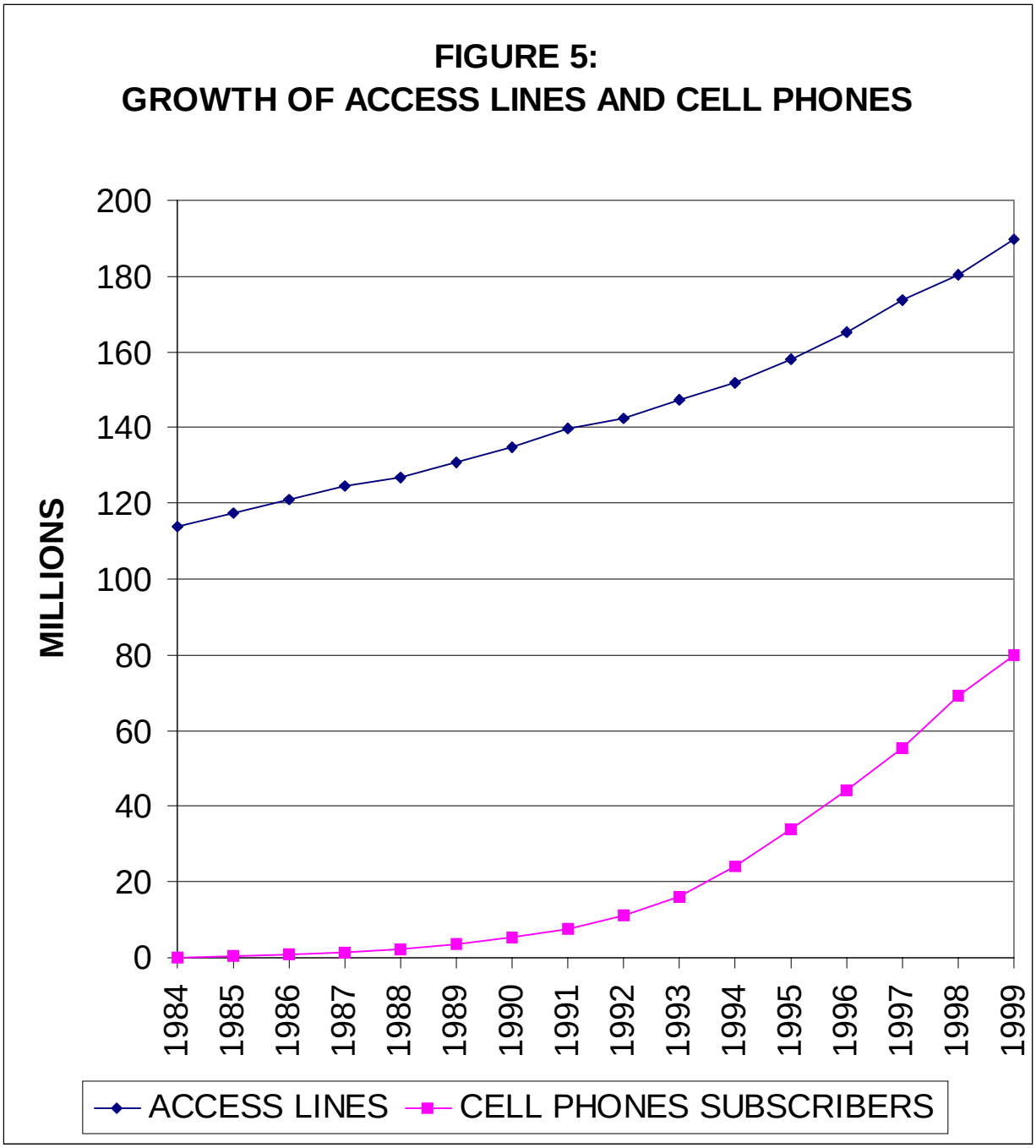

EXHIBIT 6:
EXTENT OF COMPETITION IN HIGH-SPEED INTERNET ACCESS MARKETS

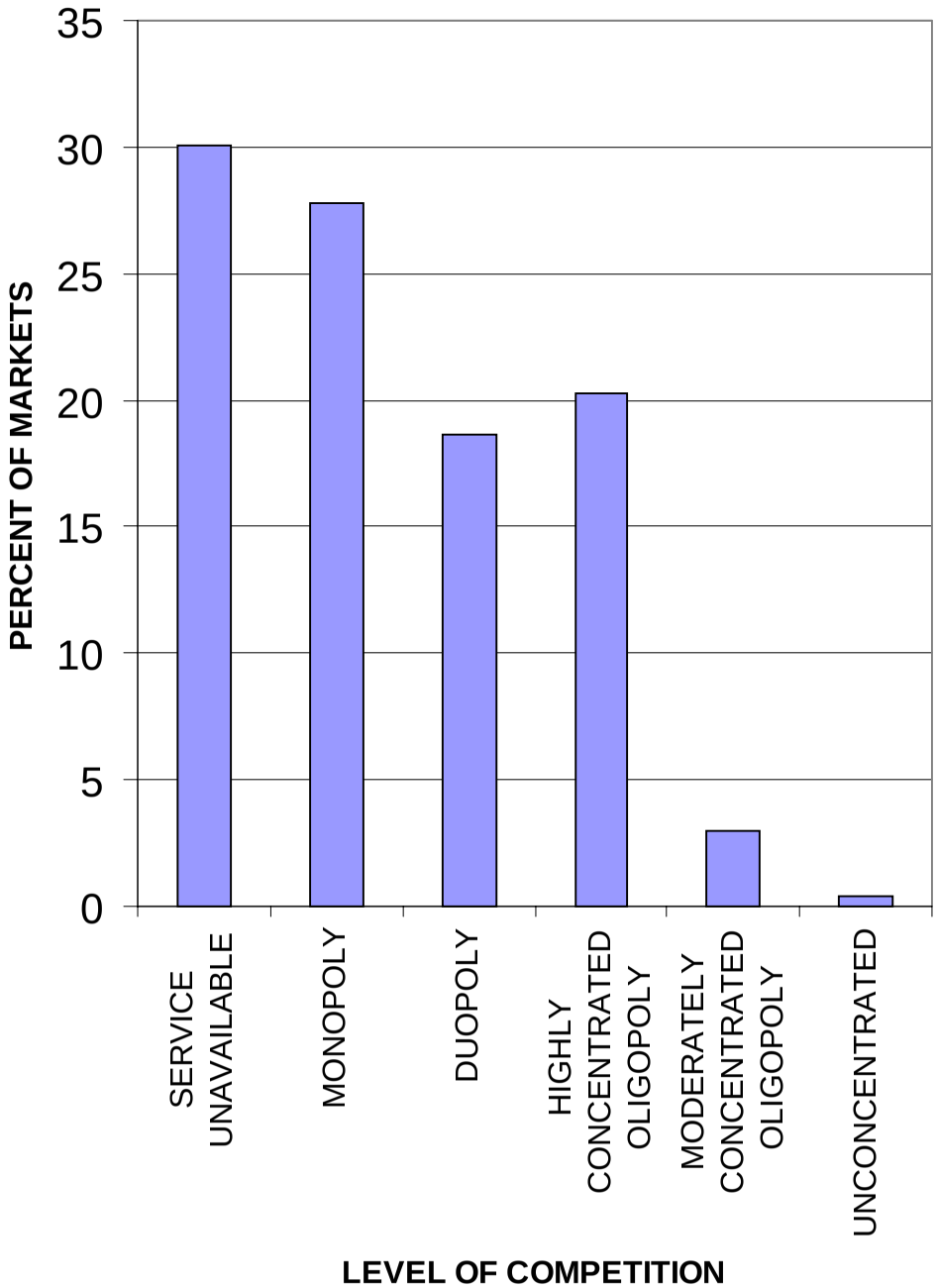

EXHIBIT 7
EXTENT OF COMPETITION IN LOCAL TELEPHONE COMPARED TO HIGH-SPEED INTERNET ACCESS MARKETS

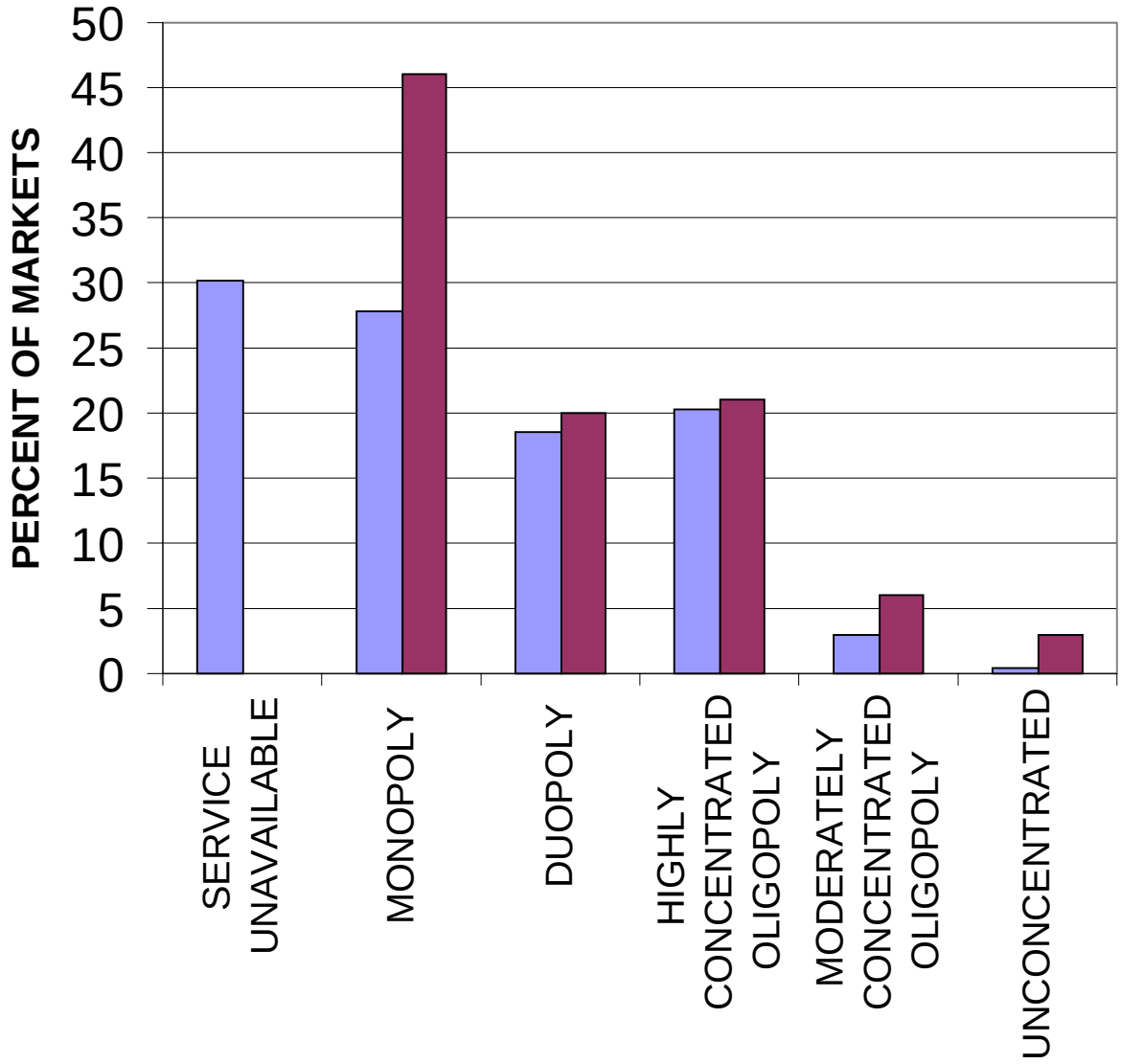

EXHIBIT 8
EXTENT OF COMPETITION IN LOCAL TELEPHONE, CABLE TV AND HIGH-SPEED INTERNET ACCESS MARKETS